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THE
Complete JURYMAN:
OR, A
COMPENDIUM
OF THE
LAWS relating to JURORS,

VIZ.

Of Grand Juries.	Trials at Bar, by <i>Nisi Prius et</i>
Of Petit Juries.	<i>per Medietatem Linguae.</i>
Who are qualified to serve on Juries.	Evidence.
Who are exempted from serving on Juries.	Witnesses.
Of returning Juries, and the Constable's Duty in preparing Lists of Persons qualified to serve.	Verdicts.
Various Methods of Trial.	How a Juror ought to demean himself.
	What Recompence a Juryman may take for his Trouble.
	Misdemeanors punishable in Juries.

In the SAVOY:

Printed by HENRY LINTOT, Law-Printer to the King's most Excellent Majesty, for ~~B.~~ Millar over-against Catherine-Street in the Strand.
MDCCLII.



P R E F A C E.

TH E chief End of all human Laws is the Preservation of Mens Lives, Liberties, and Properties : Our Ancestors are famous in History for their Wisdom and Courage in forming and preserving a Body of Laws the most capable of answering those great Ends : And those Laws they esteemed the noblest Inheritance they could leave to their Posterity. To be subject only to Laws made by their own Consent, and to be put in Execution chiefly by themselves, was a Happiness that no Nation in the World but the English ever enjoyed.

One of the most valuable Branches of our Laws is that which relates to Juries, whose Antiquity is beyond the Reach of Record or History, they have the same Aera with our Constitution, which cannot survive them, our Liberty must expire with them, as the animal Body with its most vital Parts.

In foreign Realms the Subjects chief Security is the Integrity of the King's Officers, there the Rack is on slight Circumstances the ordinary Method of trying the Truth of a Fact in criminal Cases, which if an innocent Prisoner has Fortitude sufficient to bear,

he remains a miserable Cripple the rest of his Days; tho' it often happens that excessive Torture compels him to confess a Crime he is guiltless of, and to chuse present Death as the lesser Evil.

But in England, unless by Parliament, no Man's Life can be taken away for any Crime how great soever, without the Concurrence on Oath of twenty-four Men at the least; nor could any Man, in former Times, be deprived of his Liberty or Property, but by the Verdict of twelve Men.

Our Ancestors were too prudent to trust such great Concerns in the Hands of any Officers appointed by the Crown, or of any certain Number of Men during Life, lest they should be influenced or awed by great Men, or corrupted by Bribes, Flattery, or Love of Power.

*The Incertainty of who shall be Jurors on any Inquisition or Trial, and the little Time they continue in that Office, are strong Barriers against Corruption; but when we consider also the Impartiality required and enforced in returning Juries, and the Properties which the Law requires in every Juryman when returned, we may almost doubt, whether human Wisdom is capable of providing a more perfect Method of determining the Truth of Facts, consistent with
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the Liberties of a free People, at least we may conclude that it has not hitherto done it.

Since this Book was printed, the following Alterations have been made in the Laws relating to Jurors, by

Statute 24 Geo. 2. c. 18.

THE Person, who shall by Virtue of either of the Acts of 3 Geo. 2. c. 25. & 6 Geo. 2. c. 37. apply for a Special Jury, shall not only pay the Fees for Striking such Jury, but shall also pay all the Expences occasioned by the Trial of the Cause by such Special Jury, and shall not have any other Allowance for the same, upon Taxation of Costs, than such Person would be intitled unto in Case the Cause had been tried by a Common Jury, unless the Judge before whom the Cause is tried, shall immediately after the Trial certify in open Court, under his Hand upon the Back of the Record, that the same was a Cause proper to be tried by a Special Jury.

Person applying for a Special Jury, shall pay all Expences occasioned by the Trial by a Special Jury, and shall have no other Costs than if tried by a Common Jury. Except, &c.

See fo. 67.

No Person, who shall serve upon any Jury returned by Virtue of any of the said Acts, shall be allowed for serving on any such Jury more than the Sum which the Judge, who tries the Issue, shall think reasonable, not exceeding the Sum of one Pound one Shilling, except in Causes wherein a View shall be directed.

Juryman not to take more than the Judge shall think reasonable, not exceeding 1 l. 1 s.

See fol. 182, &c. Except a View directed.

Every

Venire facias for Every *Venire facias* for the Trial of any Issue, in any Action or Information upon Trial up- any Penal Statute, in any of his Majesty's on any Pe- Courts of Record at *Westminster*, in the nal Sta- Counties Palatine of *Lancaster*, *Chester* and tute, to be *Durham*, and the Principality of *Wales*, shall awarded be awarded of the Body of the proper Coun- of the Bo- ty where such Issue is triable; any Thing dy of the in the Statute 4 *Annæ*, c. 16. to the con- County. trary notwithstanding.
See fo. 22,

125.

No Chal- No Challenge shall be taken to any Pa- lengeto be nel of Jurors, for want of a Knight's being taken for returned in such Panel, nor any Array want of a quashed by Reason of any such Challenge. Knight's being re- turned.

See fo. 23,

101.

O F

J U R I E S,

A N D T H E

Several Kinds of them.

ALL criminal Prosecutions and civil Actions depend upon a Question of Fact, and a Question of Law; that is, whether the Fact alleged be true or not, and, if it be true, whether the Prosecution or Action be maintainable by Law; the Prosecution or Action must have both Truth and Law to support it, for, if either fail, there is an End of it. And therefore the Defendant may either admit the Legality of the Action, and deny the Truth of the Fact: or he may admit the Truth of the Fact, and deny the Legality of the Action: And in some Cases deny both; as if an Action be brought on a Promise to pay a Sum of Money, for which Promise the Plaintiff

B

tiff

Juries and the several

tiff does not shew any Consideration ; if the Defendant denies he made such Promise, and upon the Trial the Jury find he did Promise ; yet upon the Defendant's shewing to the Court, that the Plaintiff has not alledged any Consideration for the Promise, Judgment shall be given against the Plaintiff, for the Law holds the Promise to be void.

The Law to be determined by the Judges, the Fact generally by a Jury.

A Question of Law is not capable of being decided by any, but by those, who are learned in the Law : and therefore it is always to be determined by the Judges ; but a Question of Fact, is for the most part to be tried by a Jury of twelve Men : And this is according to the old Maxim, *ad Quaestionem Juris respondent Judices, ad Quaestionem Facti respondent Juratores* ; but in some Cases, Matters of Fact are to be tried by a greater Number than twelve : As in the Case of a Lord of Parliament, who is to be tried by his Peers, their Number is uncertain, but must be twelve. In a Writ of Right there must be sixteen, four Knights and twelve others, or they may consist of a greater Number. *2 Roll. Abr. 674.* In an Attaint the Jury must consist of twenty four, except the Issue be upon a Matter out of the Point of the Attaint, as upon a Plea of *Non-tenure*, and then the Trial may be by twelve. And in some Cases the Fact must be found to be true by two Juries, *viz.* a Grand Jury and a Petit Jury, before Judgment can be given against the Defendant, as upon Indictments for Treason, Felony, and the like.

Juris

Juries are generally divided into Grand The several Kinds of Juries.
Juries, Petit Juries, and particular In-quests.

Grand Juries are to inquire of all Treasons, Felonies, and such other Offences committed in the County, for which they serve, as are indictable; and on sufficient Proof to accuse the Offenders, and present their Accusations to the Court.

Petit Juries are to try the Truth of some Matter of Fact in dispute, alledged by the one Party, and denied by the other.

Particular Inquests are of various Kinds, as the Coroners Inquest, who, when a Man is slain, are to inquire by whom and what Means it was done: And Inquests of Office taken before the Sheriff, as on an Action, in which the Plaintiff is to recover only Damages, if the Defendant does not deny the Fact, but admits the Plaintiff's Complaint to be true: The Court will send a Writ to the Sheriff, to inquire by the Oath of twelve Men what Damages the Plaintiff has sustained. *Cro. Car.* 414. *6 Mod.* 43. *Carth.* 362. *1 Vent.* 113.

Of Grand Juries.

IT is a Fundamental in our Constitution, To what that unless by Parliament no Man's Purpose Life can be taken away, but by the Judge-Grand Juryment on Oath of twenty-four Men at the Juries are ordained. least. A Grand Jury must accuse him, *Stat.* 25 *E. 3. c. 4.* 42 *E. 3. c. 3.* of whom twelve or more must find the Bill of Indictment,
B 2

dictment, *Cro. Eliz.* 654. *Hob.* 248. 2 *Inst.* 387. 3 *Inst.* 30. tho' it is not necessary that all above that Number agree to the Bill: A Petit Jury, who also consist of twelve; are to try the Truth of the Fact the Prisoner is accused of, and to find him guilty; but these are not the only Protections the Law of *England* affords; there must be Witnesses twice examined on their Oaths, first before the Grand Jury, and afterwards before the Petit Jury to prove the Fact; there must be learned Judges to direct in Matters of Law, who, from the Assistance the Law requires them to give the Prisoner, in Cases any Matter of Law or Matter of Fact arises in his Favour, are generally said to be the Prisoner's Counsel (for in capital Cases the Prisoner was not allowed to have Counsel, *Dr. & Stud. Dial.* 3. c. 48. but in High Treason, which may work Corruption of Blood, and in Misprision of such Treason the Prisoner is allowed Counsel. *Stat.* 7 *W.* 3. c. 3. And besides all these there is the Mercy of the Crown to interpose, in Cases Favourable or Doubtful Circumstances.

On Commissions of *Oyer and Terminari* and Gaol Delivery, and Summons of Sessions of the Peace, a Precept issues to the Sheriff to Return a Grand Jury, who are sworn to inquire, touching such Things as shall be given them in Charge. 2 *H. P. C.* 154.

By whom As the Trust the Law reposes in Grand Juries is very great, it has directed to be returned. whom they are to be returned, and what Men they are to consist: Part of this is shewn by the *Stat.* 11 *H.* 4. c. 9. wh

is as follows, ' Because of late Inquests have been taken at *Westminster* of Persons named to the Justices, without due Return of the Sheriff, of which Persons some were outlawed before the said Justices of Record, and some fled to Sanctuary for Treason, and some for Felony, there to have Refuge, by whom as well many Offenders were indicted, as other lawful Liege People of our Lord the King, not guilty, by Conspiracy, Abetment, and false Imagination of other Persons, for their special Advantage and singular Lucre, against the Course of the Common Law used and accustomed before this time: Our said Lord the King, for the greater Ease and Quietness of his People, Wills and Grants, that the same Indictments so made, with all the Dependence thereof, be revoked, annulled, void and holden for none for ever. And that from henceforth no Indictment be made by any such Persons, but by Inquests of the King's lawful Liege People, in the Manner it was used in the Time of his Noble Progenitors, returned by the Sheriffs, or Bailiffs of Franchises, without any Denomination to the Sheriffs or Bailiffs of Franchises, before made by any Persons of the Names, which by him shall be impanelled, except it be by the Officers of the said Sheriffs, or Bailiffs of Franchises, sworn and known to make the same, and other Officers to whom it pertaineth to make the same, according to the Law of *England*; and if any Indictment be made hereafter in any Point

‘ to the contrary, that the same Indictment be also void, revoked, and for ever holden for none.’

This Act in the first Place declares what was the Common Law before, and then introduces a new Law.

By that Part which is declarative of the Common Law, it appears (*inter alia*) 1st, That the Sheriffs or Bailiffs of Franchises ought to return the Grand Juries, without the Denomination of any Persons. 2^{dly}, That the Grand Juries ought to be of the King’s lawful liege People, and not to consist of Persons outlawed or the like.

By that Part, which is introductive of a new Law, it is enacted, that all Indictments to be made in any Point to the contrary shall be void.

And this extends to all Indictments for any Crime or Offence whatsoever; for the Act says, *if any Indictment*, speaking generally, without naming any Court, or before whom. But it has been doubted whether a Coroner’s Inquest be within this Statute. *Cro. Car.* 134. 1 *Jones* 198. *Ley* 51. *Oily’s Case*, *Cro. Jac.* 635.

If any of the Grand Jury be outlawed, &c. and not *probi & legales homines*, or not returned by the Sheriff, &c. or put in at the Denomination of any Person, &c. though all the rest of the Grand Jury be unexceptionable Persons, all Indictments found by them are void. 3 *Inst.* 33, 34. 12 *Rep.* 97. 11 *H. 4.* 41. *pl. 8.* *Stam. P. C.* 87, 88. *Fitzb. Indictment* 25. *Coron.* 89. *Bro. Indictment* 2.

These several Matters were adjudged in One by *Scarlet's Case*, which is as follows: *Robert Scarlet*, with private Intent, maliciously to indict some of his neighbours, requested the Sheriff to return him upon the Grand Jury, but the Sheriff, knowing the Malice of the Man, refused; notwithstanding, by Confederacy with the Clerk, who read the Panel, he was sworn tho' not returned by the Sheriff; and then maliciously upon his own Knowledge, as he pretended (his Brethren giving Credit to him) indicted seventeen honest men upon divers penal Statutes. The Justices finding so many honest Men to be indicted, as they thought, maliciously, inquired of the Grand Jury upon what Evidence they found those Bills, who answered, it was upon the Testimony and Knowledge of one of themselves, viz. this *Robert Scarlet*. Whereupon it was adjudged, 1st, That this Case was within this Statute, because he was not returned by the Sheriff. 2dly, that though he alone was sworn without the Return of the Sheriff, and all the rest duly returned; yet all the Indictments found by him and the rest were void by this Statute; for by this Case it appears what Mischief such a single Person might do. 3dly, That *Scarlet* might be indicted for an Offence against this Statute. 4thly, That this Act extended not only to Indictments of Treason and Felony, but to all other Offences whatsoever. 5thly, That this Statute was not altered as to any thing concerning *Scarlet's* Offence, by the Statute 3 H. 8. c. 12.

And for this Offence *Scarlet* was indicted, fined, and imprisoned. 3 *Inst.* 33. 12 *Rep.* 97.

But notwithstanding this Statute, the Sheriffs and their Officers having returned such Persons as for the Advantage of such Sheriffs and their Officers would be forsworn and perjured by the sinister Labour of the said Sheriffs and their Officers, whereby many had been wrongfully accused, and many great Offences had been concealed. By the Statute 3 *H.* 8. c. 12. it is enacted, 'That the Justices of Gaol-Delivery, or Justices of Peace, whereof one to be of the *Quorum*, in their open Sessions may reform the Panel returned by the Sheriff to inquire for the King, by putting to and taking out the Names of the Persons so impanelled by the Discretion of the said Justices, &c. and that the Sheriff shall return the Panels so reformed.' *Vide* the Statute 11 *H.* 7. c. 24.

This Act extends only to Justices of Gaol-Delivery and of the Peace, the Body of it for all Offences is general and evident 3 *Inst.* 33.

It extends not only to Panels of Grand Juries, but also to Panels of Petit Juries commonly called the Petit Jury, of Life and Death, which may be reformed by the Justices according to this Act, and the Sheriff is bound to return the Panel reformed. 2 *Hale's H. P. C.* 156, 265.

The Statute of 3 *H.* 8. c. 12. as has been said before, does not take away the Force of the Statute 11 *H.* 4 c. 9. as any Point wherein both may consist ro

ther; for if one of the Grand Jury be outlawed or returned at the Denomination of any Person except of the Justices by virtue of the Statute 3 *H. 8. c. 12.* the Indictment is void. 3 *Inst. 33. 2 Hawk. P.C. 219.*

A Person arraigned on an Indictment found contrary to the Statute may plead the special Matter to avoid the Indictment, and also plead over to the Felony or other Crime. A Person outlawed on an Indictment may shew that the Indictment was taken contrary to the Statute; but if the Matter to avoid the Indictment be a Matter of Record, as that one of the Grand Jury was outlawed, he must have the Record ready to shew, unless it be a Record of the same Court. 3 *Inst. 34. Cro. Car. 134. 147. 1 Jones 198. Ley 51.*

Something has already been said of what Persons a Grand Jury ought to consist, we shall now treat of that Matter more particularly.

What Persons ought to be returned of the Grand Jury.

An Infant, one who is under the Age of twenty-one Years, ought not to be returned as a Juror; and by the Statute of *Westminster 2. c. 38.* old Men above the Age of seventy Years, Men troubled with any continual Sicknefs, or infirm at the time of the Summons, are not to be put on Juries.

Paralytics, Lepers, Men who are blind, deaf, of unsound Memory, or so lame as they cannot well go or stand, of what Age soever they be, are within the Meaning of this Act, and shall have the Benefit of it;

and if returned by the Sheriff may have an Action against him without giving any Notice either of the Age or Sickness; but Notice by Word is good if Notice were requisite. 2 *Inst.* 447.

Substance. By the Statute 28 *E. 1. c. 9.* such are to be put on Inquests as are most sufficient and least suspicious. And by Lord Chief Justice *Hale* it is said, that at Common Law every Person returned on the Grand Jury ought to be a Freeholder at the least, and that the Statute 2 *H. 5. c. 3.* which requires Jurors that pass upon the Trial of a Man's Life, to have 40 *s. per Annum* Freehold, has been the Measure by which the Freehold of Grand Jurymen has been measured in Precepts of Summons of Sessions. 2 *Hale's H. P. C.* 155. 2 *Hawk. P. C.* 216. In the County of *York* 80 *l. per Annum* is required by the Statute 7 & 8 *W. 3. c. 32. §. 8.* And whereas divers Persons within the County of *York* liable to serve on Juries at Assizes and Sessions of the Peace (having very considerable Estates in Freehold and Copyhold) for their own Ease used to prevail with Sheriffs to be returned and summoned to the Service of the Sessions, being nigh their own Habitations and the Attendance there short, which often necessitated Men of meaner Estates to be on Juries at the Assizes than otherwise might and ought to be where the considerablest Men of Estates liable to the said Service, ought in the legal Course to be returned, summoned and to serve, it is enacted, that no Person interested in such Estate as will qual

fy him to serve on Juries of the clear yearly Value of 150*l.* or of any greater yearly Value, shall be returned and summoned to serve upon any Jury at any Sessions of the Peace holden for any Part of the County of *York*, upon the Penalty of 20*l.* to be forfeited by any Sheriff, Under-Sheriff, or other Officer whatsoever, making such Return and Summons as aforesaid, to be recovered for the Use of any Person that will sue for the same, in any of the Courts of Record at *Westminster*, by Action of Debt, &c. *Stat. 1 Anne, Stat. 2. c. 13. §. 3.* And if any such Person shall serve as a Juror at any of the Sessions for any of the Ridings within the County of *York*, or Adjournments for any Part of the said Ridings, he shall not be thereby exempted from serving at the Assizes for the County of *York*. *Stat. 10 Anne, c. 14. §. 6.*

The Sheriff is not to return such as Men of dwell out of the County. *Westm. 2. c. 38. the same 28 E. 1. c. 9. 2 Inst. 447, 561.* The County Grand Jury ought to be of the same County where the Crime was committed.

The Grand Juries ought to be *probi & Lawful legales homines*, good and lawful Men; Men. and therefore, as has been said before, a Man outlawed is not to be sworn on the Grand Jury, even though the Outlawry be in a personal Action. *2 Hale's H. P. C. 155. but Cro. Car. 134, 147, it is held not to be material, unless the Outlawry be for Felony. 3 Inst. 32. 21 H. 6. 30. pl. 17. Finch. tit. Process 208. 1 Jones 198. 2 Q. 99.*

The

Grand Juries.

Their
Number.

The Number of a Grand Jury must be more than twelve, and generally an odd Number, as seventeen, nineteen, or twenty-one, is sworn, to prevent the Inconvenience of an equal Number of Voices upon a Division to retard their finding or not finding a Bill, though twelve of them at the least must agree to the finding of every Bill of Indictment, otherwise it is void.

What
Number,
and of
what E-
state to
serve on
Grand Ju-
ries in
Yorkshire.

Only one Panel, consisting of forty eight (each Person having fourscore Pounds Land *per Annum*) shall be returned to serve on the Grand Inquest at any Assise for the County of *York*; and at no one Quarter-Sessions of the Peace for the said County, or within any of the Ridings within the same, or in any Place where such Sessions shall be held by Adjournment within the County, shall be returned above forty eight Persons to serve upon the Grand Inquest. *Stat. 7 & 8 W. 3. c. 32. §. 8.*

When the Grand Jury being summoned appear in Court their Names are called over, and then the Court usually names which of them shall be Foreman, to whom in the Presence of his Companions, the following Oath is to be administered:

Their
Oath.

‘ You shall diligently inquire, and tra-
‘ Presentment make of all Articles, Ma-
‘ ters and Things as shall be given you
‘ Charge, or otherwise come to your Know-
‘ ledge, touching this present Service
‘ The King’s Counsel, your own, and your
‘ Fellows, you shall well and truly keep
‘ Secret. You shall present no Man for He-
‘ tred, Malice, or Ill-will; nor leave any
‘ present

presented for Fear, Favour, or Affection, or for any Reward, Hope, or Promise thereof; but in all your Presentments you shall present the Truth, the whole Truth, and nothing but the Truth, according to the best of your Skill and Knowledge. *So help you God.*

After the Foreman is sworn, the rest of the Grand Jury are sworn, three or four at a Time in the following Manner:

' The same Oath *J. D.* your Foreman has now taken before you on his Part, you and every of you shall well and truly observe and keep on your respective Parts. *So help you God.*

After the Grand Jury is sworn, the Court gives the Charge, setting forth their Duty, and what Matters are inquirable by them, and generally what Things require their more immediate Attention.

The Clerk is to deliver to the Foreman a List in Writing of the Names of all who are sworn on the Grand Jury, for him to know his Companions, and call them by their Names, and collect their Voices in agreeing to find, or not agreeing to find any Bills brought before them. He ought also to deliver to the Foreman a Copy of the Grand Jury's Oath as a Direction to them in their Inquiry.

After the Charge is given a Bailiff is sworn to keep the Grand Jury in this Manner.

' You

Oath of a
Bailiff to
keep the
Grand
Jury.

‘ You shall diligently attend this Grand Jury during this Session of *Oyer* and *Terminer*; you shall safely carry to them all such Indictments, Informations, and other Writings as shall be delivered to you by the Court; and the same, when re-delivered to you by the Grand Inquest, you shall bring back again and deliver them safe to the Court, without any Alteration thereof. *So help you God.*’

Then the Grand Jury withdraw into some convenient Room provided for them near the Court to hear the Evidence on Bills brought to them, and to proceed together on their Business.

The Names of the Witnesses to every Bill brought to the Grand Jury should be indorsed on the back of it; and one of the Grand Jury should come from his Companions and see the Witnesses sworn to every Bill, and take the Bill and Witnesses along with him to be examined before all the Grand Jury.

If any Bill of Indictment be exhibited against any Person, and the Grand Jury find the Bill (which must be by the unanimous Consent of twelve of them at least, for if only eleven out of twenty-three, or out of thirteen, agree to it, it is no Bill) the Foreman or some of them indorse on the back of the Bill these Words *A true Bill.*

If there be more than one indicted in one Bill, and the Grand Jury have Evidence

dence to satisfy themselves to find the Bill against one or more, and not against some others, then the Bill must be indorsed thus, *A true Bill as to A. B. and C. D. No Bill as to E. F. and G. H.*

If the Grand Jury have not Evidence to satisfy them to find a Bill against any one Person named in the Bill, then they must indorse the Bill thus, *No Bill.*

If the Grand Jury upon a division of Voices, concerning the finding or not finding of any Bill, come into Court to declare their Opinions: It is usual to collect Voices from the last in the panel, and so upwards to the first; whereby the Foreman declares his Opinion last, for or against the finding the Bill. But after having heard Evidence, twelve (as has been said) must agree to find it *a true Bill*, or else indorse it *no Bill*, and deliver it into the Court.

When the Grand Jury have delivered the Bills into Court, the Clerk asks them if they are content the Court shall amend in Matter of Form, altering no Matter of Substance without their Privy; and to this they consent of Course.

The Trust and Power of Grand Juries, is and ought to be accounted the greatest and of most concern next the legislative: The Justice of *England* in criminal Cases, almost wholly depends on their Ability and Integrity in the due Execution of their Office; not only the Commoners, but the greatest of the Nobility are liable to, and must answer their Accusations. For though a Lord of Parliament in Cases of High Treason,

Treason, Petit Treason, or Felony, at the Suit of the King, is to be tried by his Peers, and not by a Petit Jury, yet he is liable to be indicted by a Grand Jury. By their Accusation a Man's Honour, Life, Liberty, Estate, Blood and Property are at Stake; and therefore they ought to consider that they are not only to bring the guilty to answer for their Crimes, but also to protect the innocent from false Accusations and Conspiracies; and the Law seems to have appointed them as the properest Safe-guards of the Subjects lives and Fortunes, as well in the one Case as the other; for by the Statute of 42 E. 3. c. 3. to avoid the Mischiefs of false Accusations it is enacted, that no Man shall be put to answer without Presentment before Justices or Matter of Record, &c. according to the old Law of the Land. And the Statute 25 E. 3. c. 4. says that none shall be taken by Petition or Suggestion, made to the King or his Counsel, unless it be by Indictment or Presentment of good and lawful Men of the same Neighbourhood, where the Fact was done; that is, by a Grand Jury. And from the great Consequence of criminal Prosecutions, it is that the Trust of inquiring out and indicting all the Criminals of a County, is placed in Men of the same County, more at least than twelve, of the most honest and most sufficient for Knowledge and Ability of Mind and Estate, to be from Time to Time at the Sessions and Assizes, and at other Commissions of *Oyer and Terminet*, named and returned by the Chief sworn Officer.

Officer of the County, the Sheriff (who was by express Law antiently chosen annually by the People of every County) who is bound by the Law to return Persons properly qualified as before is mentioned.

The Duty of a Grand Jury is most excellently set forth in their Oath (which I apprehend cannot be altered but by Act of Parliament,) and there seems to be nothing in it that requires Explanation, but that Part of it which requires them *to keep secret the King's Counsel, their own and their Fellows.* This Part of their Oath has Regard to the two great Ends of a Grand Inquest; namely, bringing the guilty to Punishment, and protecting the innocent from false Accusations.

As to the first where a Crime is committed by many Persons as in case of Treason, Murder, Robbery or the like, many Things discovered by the Magistrate or Prosecutor (who are the Persons meant by the Words *King's Counsel*) may be proper to be given in Evidence to the Grand Jury, in order to enable them to find the Bill, or some of the Grand Jury may of themselves well know some particular Circumstances, relating to the Crime, of which it may be necessary to inform their Fellows; if these Things be discovered, and the Criminals can get intelligence of all that is known of their Villanies, they, who are not apprehended, will certainly fly, and probably escape the Punishment they have deserved; or they may consult together, how to hide their Crimes,

Crimes, and prevent such further Inquiries as can be made after them; they may form sham Stories by Agreement, that may have the Appearance of Truth, to mislead and delude the Jury in the Examination, and avoid contradicting each other; they may remove or conceal all such Things as might make a fuller Discovery of their Crimes, or become circumstantial Evidence against any of their Associates, if one or more of them be known or taken, or is to be indicted.

As to the second: If a Bill be brought before them, accusing a Man of any Crime, and they find the Accusation to be malicious and the Party innocent, the Grand Jury ought not to divulge any of the Evidence, such malicious Prosecutors have given before them, though they may, and ought to indict them for such a malicious Prosecution. For though the accused Person be acquitted by the Grand Jury, yet, if what his Enemies have sworn be divulged and spread abroad, ill natured People will put different Constructions upon it, and the innocent Person will hardly ever get rid of the Scandal.

By *Stamf. 36. a.* If any of the Grand Jury, who indicted any Persons of Felony, discover the King's Counsel, in openly declaring that they have indicted such and such, such Discovery has been deemed Felony. But by *Lord Coke 3 Inst. 106.* such Discovery is accompanied with Perjury, and a great Misprision, and to be punished by Fine and Imprisonment. 18 *E. 3. Cor.*

272. 27 Aff. 63. *George's Case. Fitz.*
Coron. 207, 272.

Of Petit Juries.

IN all civil Actions and criminal Prose- The Effect
cutions, the Parties, by their Pleadings, of Plead-
are to conclude upon some certain material ing.
Point to be tried between them : The
Determination of which, either the one
way or the other, is the Foundation for the
Judgment of the Court.

This certain material Point is by Law- Issues of
yers called an Issue, as being the Product two sorts.
or Effect of the Pleadings, and is of two
sorts, either an Issue in Law, or an Issue
in Fact.

On an Issue in Law, the Question is, Issue in
whether the Law is for the Plaintiff, or Law.
for the Defendant, admitting all Facts
well pleaded to be true : As for Example,
if a Man, to whom two other Men are
jointly bound in a Bond, brings an Action
on this Bond against one of them only :
And by the Declaration, wherein the Bond
must be set forth, it appears that the
Obligors were jointly and not separately
bound ; if the Defendant upon this comes
and says that the Declaration, and the
Matter therein contained, is not sufficient
in Law for the Plaintiff to maintain his
Action against him ; and the Plaintiff on
the other Hand replies and says, that the
Declaration and the Matter therein con-
tained, is sufficient in Law for him to
maintain his Action against the Defen-
dant ;

dant ; this is an Issue in Law. If to an Action for scandalous Words, the Defendant pleads that he is under the Age of twenty-one Years : To wit, of the Age of eighteen Years and no more : And the Plaintiff replies, and says, that the Defendant's Plea is not sufficient in Law to bar him from having his Action : And the Defendant rejoins and says, that it is sufficient ; this is also an Issue in Law ; no Matter of Fact is disputed in either of these Cases, but only a Matter in Law. In the first Case the Question is, whether one of the Obligors in a joint Bond, can be sued alone without the other Obligor his Companion ; in the second Case the Question is, whether an Action for scandalous Words does not lie against an Infant of the Age of eighteen Years. And therefore these Issues are not to be tried by a Jury, but by the Judges as the proper Expositors of the Law.

Issue in
Fact.

General-
ly tried by
a Jury.

Upon an Issue in Fact, the Question is, whether some particular Fact, affirmed by the one Party, and denied by the other, be true or not ; these are of various sorts, and though the most usual Method of trying these Issues, is by a Jury of twelve Men: Yet there are in some few Cases, other Ways of trying Matters of Fact ; as by Record, Inspection, Wager of Law, Battail, &c. which being somewhat out of the Way of our principal Design, we shall pass over for the present.

As most Matters of Fact are triable by Juries, the Trust reposed in them is great, the Reputations, Lives, Liberties, and Property

Properties of all the King's Subjects depend on their Capacity and Impartiality; from them the Accused expects Life or Death, the Injured his Right and Recompence for his Loss, and the Innocent Protection from malicious and false Prosecutions or Actions: And as the Trust committed to Juries, is of such great Importance to the whole Kingdom, our Laws have made most excellent Provisions, that it should be executed by Men equal to it, by Men of Fortune, which is a Pledge for their good Behaviour, by Men of Reputation and of proper Age and Capacity; and therefore we shall now consider:

Of what Men Petit Juries ought to consist; and also who are exempted from serving on Juries.

EVERY Jury that is returned for the Trial of any Issue or Cause, ought to have three Properties. 1st, He ought to be dwelling most near to the Place, where the Question is moved. 2^{dly}, He ought to be the most sufficient for Understanding and Competency of Estate. 3^{dly}, He ought to be least Suspicious, that is, to be indifferent as he stands unsworn, and then he is accounted in Law *Liber & Legalis Hemo*; otherwise he may be challenged, and not suffered to be sworn. 1 *Inst.* 155. a. b.

Men, who do not reside in the County, shall not be put upon Juries. *Stat. West. 2. c. 38.* 13 *E. 1.* The Jury is regularly County.

gularly to come from that County, in which the Matter is alledged to arise; and antiently from the Vicinity, Neighbourhood, or Hundred; *vicini vicinorum facta praesumuntur scire*, Persons living in the Neighbourhood, being esteemed the properest Judges of the Facts done within it's Limits, as being most likely to be proved by Witnesses, and charged upon Persons, with whose Integrity and Reputation they are best acquainted. 2 *Hawk. P. C.* 182, 403. 5 *Mod.* 405. If two Jurors come from the Vicinity or Hundred, it is sufficient. *Stat.* 35 *H. 8. c. 6.* 27 *Eliz. c. 6.* 1 *Inst.* 157. *a.* *Hard.* 228. 2 *Hal. H. P. C.* 272. If the Lord of the Hundred be a Party, the Jury are to come from the next Hundred. And in an Action on the Statute of Hue and Cry, the Jury shall come from the next Hundred to that where the Robbery was committed. 1 *Inst.* 157. *a.* 2 *Roll. Ab.* 596. And by the Statute 4 & 5 *Ann. c. 16.* the Jury in all Cases shall come from the Body of the whole County, except in criminal Prosecutions, and Actions on Penal Statutes.

If the Issue be on a Matter arising in two Counties, and if the Counties join, the Jury may come out of both Counties; but if the Counties do not join as *Middlesex* and *Cornwall*, the Issue may be tried by a Jury of either County. 2 *Roll. Abr.* 601, 603. 5 *Mod.* 223. *Hob.* 330. 2 *Brownl.* 272.

In what
Cases
Knights
are to be
of the Jury.

In a Writ of Right, four Knights ought to be on the Jury.

In an Attaint, a Knight ought to be returned of the Jury.

In all Cases where a Peer of the Realm, or Lord of Parliament is Party, a Knight ought to be returned of the Jury; but when a Knight is returned of the Jury, tho' he does not appear, the Jury may be of the Residue. 1 *Inst.* 156. a. 6 Co. 53. 1 *Leon.* 5. 1 *Mod.* 226. *Skin.* 229. 1 *Roll. Ab.* 37. 2 *Mod.* 182. 2 *Shew.* 422. Upon an Indictment for High Treason, or Misprision of the same, Petit Treason, Murder or other Felony, or Misprision of the same, a Peer shall be tried by his Peers; but for a lesser Crime, though at the Suit of the King, and on an Appeal, he shall be tried by a Jury. 2 *Inst.* 49. 3 *Inst.* 30.

All Jurors (other than Strangers upon Every Ju- Trials *per Medietatem lingue*) to be re- ror in
turned for Trials of Issues joined in the England,
Courts of King's Bench, Common Pleas or to have
Exchequer, or before Justices of Assise, 10 l. per
Nisi prius, Oyer and Terminer, Gaol- Annum
Delivery or Quarter Sessions, in any Coun- Freehold.
ty of *England*, shall have within the
County 10 l. by the Year, of Freehold or
Copyhold, or Antient Demesne, or in
Rents, in Fee-simple, Fee-tail or for Life;
and in every County of *Wales*, every such In *Wales*
Juror shall have 6 l. by the Year as afore- 6 l.
said; and if any of a lesser Estate be re- A lesser
turned, it shall be a good Cause of Chal- Estate, a
lenge, and the Party returned, shall be good
discharged upon the said Challenge, or Cause of
upon his Oath. *Stat.* 4 & 5 *Will.* & *Mar.* Chal-
6. 24. §. 15. lenge.

It

On a Tales 5 *l.* upon the Tales in *England*, who shall have within the County 5 *l.* by the Year; and upon the Tales in *Wales* who shall have within the County 3 *l.* by the Year. Same *Stat.* §. 18, 19.

What Leaseholds.

Any Person having Land in his own Right, of the yearly Value of 20 *l.* over and above the reserved Rent, being held by Lease for the absolute Term of 500 Years or more, or for 99 Years, or any other Term determinable on one or more Lives, may be summoned to serve on Juries as Freeholders may. *Stat.* 3 *Geo.* 2. c. 25. §. 18.

A sufficient Qualification. All Leaseholders upon Leases, where the improved Rent shall amount to 50 *per Annum*, over and above Ground-Rent or other Reservations, shall be liable to serve upon Juries. *Stat.* 4 *Geo.* 2. c. 7. §. 3.

In London, Jurors to have Lands, or Personal Estate of 100 *l.* Value. The Sheriffs of *London* shall not Return any Person, to try any Issue joined in any of His Majesty's Courts of King's Bench, Common Pleas or Exchequer, or to serve on a Jury at the Sessions of *Oyer and Terminer*, or Sessions of the Peace to be held for the said City, who shall not be House-keeper within the City, and have Lands, &c. or Personal Estate to the Value of 100 *l.* and the same Cause alledged by way of Challenge, and found, shall be admitted as a Principal Challenge; and the Person challenged may be examined on the Oath of the Truth of the Matter. *Stat.* 3 *Geo.* 2. c. 25. §. 19.

The Sheriffs or other Officers, to whom the Returning of Juries doth belong, for any County, City or Place, shall not return any Person to serve on a Jury, for the Trial of any Capital Offence, who would not be qualified in such respective County, City, or Place, to serve as a Juror in civil Causes; and the same Matter shall be a principal Challenge; and the Person so challenged, may be examined on Oath, of the Truth of the Matter. Same Stat. 6. 20. which Statute is made perpetual by Stat. 6 Geo. 2. c. 37.

As these Statutes govern the Qualifications of Jurors, as to their Real and Personal Estate, in most Cases, and are therefore of more general Use, I have thought it necessary, to offer them first to the Readers Perusal; but as in some Cases it may not be necessary for a Juror to have so great an Estate, Real or Personal, as these Statutes respectively require; I shall consider this Matter a little more particularly, and see how the Law stood before these Statutes.

By the Statute of 21 Edw. 1. *De his, qui non ponendi sunt in assisis*, It is enacted, that none shall be put upon Juries, except in Cities, Boroughs, and Market-Towns, who have not 40 s. a Year in Land.

By this Statute, and also by the Register, fo. 181. it seems admitted that at the Common Law there was no Necessity, that Jurors in Cities or Boroughs should have any Freehold.

What Estate a Petit Juror

Also it seems agreed, that the Common Law doth not require, that a Juror should in any Case have a Freehold of any certain Value; and upon this Head it has been adjudged, that a Freehold worth but 20 s. or 5 s. or even 1 d. is still a sufficient Qualification for a Juror, in such Cases as are not within the Statutes, which require a Freehold of a greater Value.

Also it hath been adjudged, that the Common Law did not require that a Juror should in any Case have any Freehold; but this has been contradicted by many express later Authorities; agreeable to which, it seems to be settled at this Day, that the want of Freehold is a good Challenge of a Juror in all Cases, not otherwise provided for by Statute, and consequently in a Trial for High Treason in *London*, as well as in any other County. But it seems agreed that whenever the Letter of the Common or Statute Law requires that a Juror should have a Freehold, the Meaning is fully satisfied by his having the Use of a Freehold; and that it is not material, whether he have it in his own or his Wife's Right, or whether it be absolute, or upon Condition, or an Estate of Inheritance, or only for Term of one's own or another's Life, so that it be in the same County wherein the Suit is brought, and actually continue in the Juror till the Time when he is sworn. 2 *Hawk. P. C.* 415. c. 43. §. 12, 13.

The next Statute is that of the 2 *H. 8.* c. 3. which enacts, That no Person shall be admitted to pass in any Inquest upon
Trial

Trial of the Death of a Man, or between Party and Party, in Plea real or personal, where the Debt or Damages declared amount to forty Marks, unless he have 40 s. a Year above Reprises, if he be challenged, &c.

This Statute does not extend to an Indictment or Information for a Crime not capital. 2 *Hawk. P. C.* 416. S. 16.

This Statute was introductive of a new Law only with respect to the *Quantum* of the Freehold; for by the Common Law it was requisite that a Juror should be a Freeholder; so that tho' this Statute be repealed by the general Words of the Statute *P. & M. c. 10.* as to Treason, yet some Freehold was still necessary; and so it was allowed in *Fitzharris's Case* by *Pemberton Ch. J. State Trials, Vol. iii. p. 263.* notwithstanding it was ruled otherwise in the Case of *Lord Russell*, by the same Judge, *p. 634.* and in the Case of *Col. Sidney*, *p. 736.* Which last Resolutions were declared to be illegal by several Acts of Parliament. *Stat. 1 W. & M. Sess. 2. c. 2. 7 W. 3. c. 3.* Sir *John Hawles's Remarks* on those Trials. *State Trials, Vol. iv. p. 169, 189.* 2 *H. H. P. C.* 272.

No Bailiff or other Officer shall return on any Panel, any Person upon an Inquiry in the Sheriff's Turn, but such as have Lands and Tenements in the same County, or Freehold to the yearly Value of 20 s. at least, or Copyhold to the yearly Value of 1 l. 6 s. 8 d. *Stat. 1 R. 3. c. 4.*

In all Cases where Jurors ought to have Lands of 40 s. a Year, they shall from
C 2 hence.

henceforward have Lands of 4*l.* a Year. And if the Sheriff return any Person who hath not 4*l.* *per Annum*, he shall forfeit 20*s.* Stat. 27 *Eliz.* c. 6.

This Statute extended only to Issues joined in the King's Bench, Common Pleas, or Exchequer, and before Justices of Assize; so that it reached not to Trials of Felons before Justices of Gaol-Delivery, Oyer and Terminer, or of the Peace: but those Trials stood as they did by the Statute 2 *H.* 5. as to the Value of Jurors. *Vide* Stat. 33 *H.* 8. c. 23. 2 *H. H. P. C.* 273. c. 36.

In an Information brought by the Queen against Sir *Christopher Blunt*, upon an Intrusion, a Juror was challenged for Insufficiency of Freehold; upon Examination it appeared that he had Freehold to the Value of 15*s.* *per Annum*. It was ruled by the Court that he had sufficient to pass on that Jury, for at the Common Law if a Juror had any Freehold it was sufficient; and tho' by the Statute 2 *H.* 5. a Juror ought to have 20*s.* *per Annum*, and by the Statute 27 *Eliz.* 4*l.* *per Annum*, where the Damages exceed 40 Marks; yet the Statutes speak only between Party and Party, which extend not to the Queen: wherefore the Juror was sworn: But it was ruled that he ought to have some Freehold; and therefore, one who had not any Freehold was there challenged and withdrawn. *Mich.* 37 & 38 *Eliz.* *B. R.* Sir *Christopher Blunt's* Case. *Cro. Eliz.* 413. *Goldsb.* 136.

The Sheriffs of *London* may impanel Persons, being Citizens, who have Goods to the Value of 100 Marks, who shall be sworn, and act as other Persons who have Lands of the Value of 40 s. *per Annum*. Stat. 4 H. 8. c. 3.

Any Person being a Freeman of any City or Town corporate, and worth in moveable Goods and Substance to the Value of 40 l. shall be admitted in Trials of Murders and Felonies in every Sessions and Gaol-Delivery to be holden for such Cities and Towns corporate, although they have no Freehold; provided that this Act do not extend to any Knight or Esquire abiding in, or resorting to such City, &c. Stat. 23 H. 8. c. 13.

But notwithstanding this Saving for Cities, Boroughs and Towns corporate, there is no express Saving of any Trial contrary to the Purview of this Statute, and made good by some other; and therefore it may be argued, that the Trial of Felonies in Towns by Jurors worth 40 l. in Goods, by Virtue of this Statute is no longer lawful, it not being a Trial by Usage, but by Statute. Yet seeing the Statute 4 & 5 W. & M. seems plainly to have a View to Trials in Counties only; and the Statute 16 & 17 Car. 2. c. 3. which is penned almost in the very same Words, was taken no way to alter the former Method of Trials in Towns, least it should cause a Failure of Justice; and it being generally impracticable to get a sufficient Number of such Freeholders as the Statute requires in Towns, it seems a reasonable Construc-

tion of the Statute 4 & 5 W. & M. that the Trial by the Statute of 23 H. 8. still continues lawful; but it hath been agreed, that for Trials in *London* for High Treason, every Juror ought to have such Freehold or Copyhold as is required by the Statute 4 & 5 W. & M. 2 Hawk. P. C. 417. c. 43. §. 24. *Vide antea* fo. 25.

In an Information in the Nature of a *Quo Warranto* against several Citizens of *Worcester*, for using several Liberties and Franchises in the said City, the Counsel for the Defendants challenged the Polls, for that the Jurors had not any Freehold within the County. The Judges debated this Matter, and seemed to think it no good Challenge, because the Statute 2 H. 5. c. 3. doth not extend to Cases where the King is Party; and the Statute 35 H. 8. c. 3. extends not to Cities and Corporations, but to the Sheriffs of Counties at large; for if a Panel made in a Corporation must have Freeholders, it must likewise have six Hundredors, which cannot be in any Corporation; and so 27 Eliz. c. 6. Therefore Jurors in Corporations must not be as at Common Law. It is true in *Blunt's Case* (*supra*) it is said, that there ought to be some Freeholders, but that cannot be intended in Corporations, because in many there are no Freeholders at all, and so there would be a Failure of Justice; and such a Challenge was never made in any Trial at *Nisi Prius* in Guildhall, *London*; and it would be inconvenient, after so long Practice to the contrary, to admit such Challenge.

Hil. 34 & 35 Car. 2. B. R. Rex v. Higgins. T. Raym. 484. Skin. 91. S. C. says, the Court seemed to doubt as to this Point, it being in a City which was a County within itself, and sent to the Judges of the Common Pleas to know their Opinion; which was, that it was no Challenge; and that thereby sometimes might happen a Failure of Justice. *Ibid. 106. & 1 Vent. 366. S. C. 2 Show. 287. S. C.*

By the Statute 4 & 5 W. & M. c. 24. it is not sufficient that a Juror be a Freeholder, but he must also have within the same County freehold or copyhold Lands to the clear yearly Value of 10 l. And tho' this Statute seems principally to regard Counties at large; yet it has been allowed to extend to Trials in London for High Treason. 2 H. H. P. C. 272, 273. *Francoia's Case. State Trials, Vol. vi. fol. 58. Loyer's Case, Ibid. 245.*

By the Statute 8 H. 6. c. 29. Insufficiency or Default of Frank-tenement, is not any Challenge to Aliens, who are impanelled with *English*; but yet it seems to be a Challenge to the *English* who are impanelled with the Aliens; for the Words of this Statute rely all upon the Aliens. *Stamf. lib. 3. 160. b. 2 H. H. P. C. 274. 236. 2 Hawk. P. C. 419. c. 43. §. 35.*

He who is a-kin to either Party, either by Blood or Marriage ought not to be of the Jury; nor he, who is under the Influence of either Party, as Tenant or Servant of the Plaintiff or Defendant; or against whom either Party has any Action then depending; or who has any Action which imports Jury.

imports Malice, as Battery or Slander, against either Party; a Man who is to have any Benefit by the Event of the Suit, is not to be of the Jury; as if he has a Claim to a Forfeiture which will incur by convicting the Defendant; nor he who has been chosen an Arbitrator by one of the Parties, and treated of the Matter in Dispute; the same of him who has declared his Opinion of the Matter beforehand, particularly if such Declaration proceeded from Ill-Will. An Indictor, or one who has formerly given a Verdict in the same Matter, is not to be of the Jury. *1 Inst.* 157, 158. *Hob.* 87. *1 Saund.* 344. *9 Co.* 71. *a.* *Cro. Eliz.* 33. *Stat.* 25 *E.* 3. *c.* 3. *1 Sid.* 244. *2 Hawk. P. C.* 418. *Cro. Eliz.* 663. *1 Vent.* 309. *Allen* 29. *1 Salk.* 152. But of these Objections to a Juror we shall treat more fully under the Head of Challenges.

Persons
convicted
of any
Crime.

A Juror may be challenged if he be attainted or convicted of Treason or Felony, or for any Offence, to Life or Member, or in an Attaint for a false Verdict, or for Perjury as a Witness, or of Forgery on the Statute 5 *Eliz. c.* 14. or in a Conspiracy at the Suit of the King, or in any Suit (either for the King or for any Subject) be adjudged to the Pillory, Tumbrel, or the like, or to be branded or to be stigmatized, or to have any other corporal Punishment whereby he becomes infamous; for it is a Maxim in Law, *repellitur a sacramento Infamis*; and these or the like are principal Causes of Challenge. And it has been holden that such Exceptions are

are not salved by a Pardon; but none of the above recited Challenges are principal ones, but only to the Favour, unless the Record of the Judgment or Conviction be produced, if it be a Record of another Court, or the Term, &c. be shewn, if it be a Record of the same Court. 1 *Inst.* 158. a. 2 *Hawk. P. C.* 417. c. 43. §. 25. If a Man be attainted of Felony, and pardoned, he shall not afterwards be sworn of a Jury, for he is not *probus & legalis homo*; *poena mori potest, culpa perennis erit.* 2 *Bulst.* 154. 1 *Brownl.* 34.

If one, who is outlawed, be returned on a Jury, he may be challenged, for he is not *legalis homo.* 21 *H. 6.* 30. b. *Bro. Chall.* 64. though the Outlawry be only in a personal Action. 1 *Inst.* 158. a. And the Statute 11 *H. 4.* extends to Persons outlawed in personal Actions, because an outlawed Person is not accounted *probus & legalis homo* to be sworn in an Inquest, and may be challenged for that Cause. *Cro. Car.* 194. 1 *Jones* 198. But it seems that it is not a principal Challenge, but only to the Favour, unless the Record of the Outlawry be produced, if it be a Record of another Court, or the Term, &c. shewn, if it be a Record of the same Court. 2 *Hawk. P. C.* 417. c. 43. §. 25.

Persons
outlawed.

In the old Books it is said, that if a Persons Man be excommunicated, he cannot be of excommunicated. 1 *Inst.* 158. a. 2 *Hawk. P. C.* 417. c. 43. §. 25.

Aliens born cannot be returned of Juries Aliens. for the Trial of Issues between the King and the Subject. 7 *Co.* 18. b. 10 *Co.* 104. d.

14 H. 4. 19, 23. Bro. Chall. 48. Denizen 2, 11. Fitz. Chall. 91. 1 Inst. 156. b. But by the Statute 28 E. 3. c. 13. when an Alien is Party as well in the Case of the King as of a Subject, one Half of the Jury shall be Denizens and the other Half Aliens, if there be so many in the Town or Place; if there be not, then so many Aliens as are in the Town. When both the Parties are Aliens it is not necessary that one Half of the Jury be Aliens. 2 Hawk. P. C. 419.

Old Men. Old Men above the Age of seventy Years are not to be put on Juries. Stat. Westm. 2. c. 38. 13 E. 1. 2 Inst. 446. F. N. B. 165. Stat. 7 W. 3. c. 32. (1. 4. Stat. 3 & 4 Annæ, c. 18. §. 5.

Persons infirm.

Persons troubled with any continual Disease, or sick at the Time of the Summons, are not to be returned on Juries. Stat. Westm. 2. c. 38. 13 Ed. 1. As Paralytics or Lepers, and Men so infirm that they are not able to serve. Men who are deaf, blind, of unsound Memory, or so lame that they cannot well go or stand, shall have the Benefit of this Statute of what Age soever they be. And this is in Affirmance of the Common Law. 2 Inst. 447.

The Statute of *Westminster* 2. c. 38. which enacts that old Men above the Age of seventy, or sick, or diseased, or not dwelling in the County, shall not be put in Juries, is a direct Prohibition of itself, and therefore the Party grieved may have his Action against the Sheriff, without giving any Notice either of his Age, Sick-

ness

ness, or Non-commorancy, yet it is usual to sue out a Writ (*de non ponendis in assisis*) grounded upon this Statute to the Sheriff, that he return them not. But without doubt Notice by Word is sufficient, if Notice be requisite. 2 *Inst.* 447. *F. N. B.* 166. *Reg.* 179, 180, 181, 183.

No Writ *De non ponendis in assisis & juratis* shall be granted, unless upon Oath made that the Suggestions are true. *Stat.* 4 & 5 *W. & M. c.* 24. §. 21.

If any Sheriff shall allow of any Writ of *Non ponendis in assisis & juratis*, or other Writ, to excuse any Person from the Service of any Jury under the Age of seventy Years, he shall forfeit 20 *l.* to be recovered by any who shall sue for the same in any of the Courts at *Westminster*. *Stat.* 7 *W.* 3. c. 32. §. 6.

If any be returned of a Jury contrary to the Purview of the Statute *Westm.* 2. he cannot be challenged, neither can the Party grieved alledge the Matter for his Discharge, but he must take his Remedy against the Sheriff upon this Act. 2 *Inst.* 447. *F. N. B.* 166. 1 *Brownl.* 41. *Butler's Case* *L. P. R.* Tit. *Jury*, 124. If any Person required to make out Lists of Persons qualified to serve on Juries shall wilfully insert any Person that ought to be omitted, he shall, on Conviction before a Justice of the Peace, forfeit 20 *s.* and the Justice shall certify the same to the next Quarter-Sessions, which shall direct the Clerk of the Peace to strike out the Name. *Stat.* 3 *Geo.* 2. c. 25. §. 2.

Infants,

Infants.

Infants, Persons under the Age of twenty-one Years, are not to be returned on Juries. *Mirr. c. 3. §. 34. f. 225. Litt. §. 259. 1 Inst. 172. b. Stat. 7 W. 3. c. 32. §. 4. Stat. 3 & 4 Annæ, c. 18. §. 5.*

Where a Juror should be forty-two Years of Age.

In a Writ *De aetate probanda*, every Juror should have been of the Age of forty-two Years at the least, so that he was of full age at the Time of the Birth of him who sued out the Writ. *21 R. 2. Fitzb. Livery. 5 Bro. Jurors 42.* For he was to try a Thing above twenty-one Years past; and a Man cannot be a Juror till he be twenty one Years of Age. *Hob. 325.*

Women.

In some Cases Women are to be sworn on a Jury: as where a Woman is attainted of Treason or any capital Crime for which she is to suffer Death, and being asked what she can say for herself in Stay of Execution of her according to the Judgment given against her? if she is with Child, she may alledge that Matter, and pray a Jury of Matrons to inspect and try whether she is with Child or not; and the Court will accordingly order the Sheriff to return a Jury of Matrons, and, if they find her to be with quick Child, the Execution shall be respited, that the Child may not suffer Death for the Crime of the Mother.

In Case of Pregnancy pleaded.

And on a Writ *De ventre inspiciendo*.

Also if a Man seized of an Estate of Inheritance marries, and afterwards dies without an Heir of his Body whereby the Inheritance ought to descend to his Brother or any other collateral Heir, and the Widow pretends to be with Child by her deceased Husband, the Brother or other collateral Heir, to prevent any supposititious Birth, may have

have out of the Chancery a Writ *De Ven-
tre inspiciendo*, whereby the Sheriff shall
cause the Woman to be examined by a Ju-
ry of Matrons whether she be with Child
or not. *Reg.* 227.

Tenants in Antient Demesne are not to be impanelled to appear at *Westminster* or elsewhere in any other Court upon any Inquest or Trial of any Cause. 4 *Inst.* 269. c. 58. *F. N. B.* 166. *F.* 167. 1 *Co.* 105. If he be returned, his only Remedy is against the Sheriff. *Pasch.* 31 *Eliz.* C. B. *Mills v. Snowballs*, 1 *Leon.* 207. Tenant in Antient Demesne.

If a Peer be returned on a Jury, and bring Peer. a Writ of Privilege, he shall be discharged. 22 *Aff.* 24. 48 *E.* 3. 18, 30. 48 *Aff.* 6. 3 *H.* 8. 46. 8 *Bro. Chall.* 209, 211. *Ex-empt.* 3. *F. N. B.* 165, 166. *E. Regist.* 178. But the better Opinion seems to be that even without such Writ he may chal-
lenge himself, or be challenged by either
of the Parties. 2 *Roll. Abr.* 646. 1 *Inst.* 156. b. 157. 9 *Co.* 49. 6 *Co.* 53. 1 *Jones* 153.

It does not appear that Members of the House of Commons have any Privilege of being exempted from serving on Juries; but in Sir *Edward Bainton's* Case, who was returned on a Jury in the King's Bench, he being a Parliament Man, and the House then sitting, the Court would not compel him to be sworn against his Will. *Pasch.* 1665. Sir *Edward Bainton's* Case. Members of the House of Commons.

Persons whose Attendance is required in the superior Courts of Justice, as Serjeants at Law, Counsellors, Attornies, and other Serjeants, Counsel-
lors, At-
tornies, &c.

other Officers, and Ministers of the Courts are privileged from serving on Juries. 2 *Roll. Ab.* 646. *T. p.* 5, 6. *Hill.* 1676. *B. R.* Countess of Northumberland's Case. 2 *Mod.* 182.

Persons in Holy Orders.

Clerks or Persons in Holy Orders, ought not to be returned on Juries. *Trials per pais*, c. 7. §. 3. *F. N. B.* 166. *B. Dalton's Sheriff* 121, 312. 4 *Leon.* 190. 2 *Inst.* 4, 121.

Coroners, Verderers.

Coroners, Verderers, Foresters and other Officers of the Forest, ought not to be returned on Juries. *F. N. B.* 167.

Officers in the Army and the King's Servants.

Officers of the Army, and other Officers and Ministers belonging to the King, are exempt from serving on Juries. *New Abr. of the Law.* *Trials* 261.

Surgeons exempt from serving on Juries in London.

The Wardens and Fellowship of Surgeons in *London* are discharged, and not chargeable of Inquests and Juries within the City of *London*; and this Act extends to all Barber-Surgeons admitted according to the Statute, so that they exceed not at one Time the Number of twelve. *Stat.* 5 *Hen.* 8. c. 6. *vide Stat.* 18 *Geo.* 2. c.

Apothecaries of London exempt from serving on Juries so long as they shall use the said Art.

All Persons using the Art of an Apothecary within the City of *London* and seven Miles thereof, being free of the Society of Apothecaries of *London*, and who shall be examined and approved, so long as they shall use the said Art, shall be exempt from serving upon Juries; and if any such Person shall be returned to serve in any Jury, such Person producing a Testimonial under the common Seal of the Corporation, of such his Examination, Approbation and Freedom,

Freedom, shall be discharged. *Stat.*

6 *Will. 3. c. 4. §. 3.*

All Persons using the said Art of an Apothecary within any other Parts of this Kingdom, *Wales* or *Berwick*, and who shall be brought up and serve in the said Art as an Apprentice seven Years, shall likewise be exempted from the Duty aforesaid, so long as they shall use the said Art. Same *Stat. §. 4.* made perpetual by *Stat. 9 Geo. 1. c. 8.*

And in all other Parts having served an Apprenticeship.

All Sailors duly registered are exempted from serving on Juries. *Stat. 7 & 8 W. 3. c. 21.*

No Quaker or reputed Quaker shall serve on Juries. *Stat. 7 & 8 W. 3. c. 34. §. 6.*

Ingram a Quaker, being returned on a Jury, appeared, but refused to be sworn: Whereupon *Fyre* Chief Justice fined him 40 s. On Motion to take off the Fine, the Chief Justice and *Denton* Justice were of Opinion he was Fineable. *Fortescue* Justice *contra*, but desired Time to consider. *Reeve* Justice, the Statute does not totally disable a Quaker from serving on a Jury, but only disables him to serve taking an Affirmation instead of an Oath; and it is very well known that in criminal Cases, Quakers have submitted to be sworn and examined on Oath as Witnesses; therefore I think the Lord Chief Justice has done right in setting the Fine. *Mich. 8 Geo. 2. C. B. Irwin versus Goldsmith, Pract. Reg. C. B. 247.*

The King by his Grant or Charter may exempt one, two or more Persons from serving King.

Persons exempted by the King.

serving on Juries; but he cannot exempt a whole Hundred or County, because it would occasion a Failure of Justice; and such Exemption will not extend to a Juror returned in the Court of King's Bench, unless there be express Words in the Grant or Charter including that Court. It is held that the Sheriff cannot return such Privilege of Exemption, but each particular Juror must come in and demand it. 1 Sid. 127, 243. T. Raym. 113. Hard. 389.

In order to answer this great End of always having an impartial Jury, the Law ordains, that the Officer whose Duty it is to nominate and impanel the Jury, be impartial also, and liable to no Exception; and therefore we will now shew in a summary Manner

*Who is to nominate, impanel,
summon and return the Jury.*

Who is to
impanel
and return
the Jury.

AS every Suit or Cause of Action arises and must be laid in some County or another, the Sheriff who is the chief Officer of the County must impanel and return the Jury; but in case he is of Kindred to, or under the Influence of either of the Parties, (as shall be more particularly shewn hereafter when we treat of Challenges to the Array,) then the Process for impaneling and returning the Jury shall be directed to and executed by the Coroners of the

the County; or in case any of them are of Kindred to or under the Influence of either of the Parties, then the Process shall be directed to and executed by such of the Coroners as are indifferent; but if none of the Coroners are indifferent, then the Court will direct the Process to two Persons nominated by themselves. 1 Inst. 158. a. Bro. Chall. 153.

But the Process shall not go to the Coroners, unless there be a Default in the Sheriff himself; as if the Array be challenged and quashed, for that it was made by an Officer of the Sheriff who was of Counsel with the Plaintiff, the Sheriff shall be ordered to make the Array by another; so if Favour be found in the Under-Sheriff, and if the Array made by the Bailiff of a Liberty be quashed for Affinity between him and the Plaintiff, Process with a *Non omittas* shall go to the Sheriff.

If the Array be quashed for Favour or Non-indifferency in the Sheriff, Process shall not afterwards be awarded to the Sheriff, though a new Sheriff be made.

riff, it shall never go back, tho' a new Sheriff be made.

If the Array be quashed for a Default in the Coroners, Process shall never go to those Coroners, nor to others, but to Elisors chosen by the Court.

If Array quashed for Default in

the Coroners, Elisors to be chosen.

But

Where
Venire de
novoto the
new She-
riff, Array
being
quashed
for Affini-
ty in the
old She-
riff.

But if the Array of the principal Pa-
nel be quashed for Affinity between the
the Sheriff and either Party, and the Ar-
ray of the Tales be made by a new She-
riff, the *Venire facias de novo* shall be
awarded to the new Sheriff, for no De-
fault is in him; so if the Array made by
the Predecessor of the present Sheriff be
challenged and quashed for Consanguini-
ty, the Plaintiff may pray Process ei-
ther to the present Sheriff or to the Co-
roners.

On Death
of Sheriff.

If a Sheriff dies, Process does not issue
till another is made, and shall not go to the
Coroners. *Pasch. 4 W. & M. Rex versus*
Warrington. 12 Mod. 22. Sed quaere nunc,
for if the Sheriff die before the Expiration
of the Year, or before he be superseded,
the Under-Sheriff shall nevertheless con-
tinue in his Office and execute the same
in the Name of the Deceased, till another
Sheriff shall be appointed and sworn;
and shall be answerable during the Inter-
val, as the Sheriff would have been.
Stat. 3 Geo. 1. c. 15. §. 8.

One of the
Sheriffs a
Party.

If an Action be brought by one of the
Sheriffs of London, (or of any other Place
where there are two Sheriffs) the *Venire*
facias may be awarded to the other She-
riff. *Pasch. 35 Car. 2. B. R. Rich versus*
Player. 1 Show. 286. pl. 283. 2 Show.
262. pl. 268. Skin. 104. In an Informa-
tion for a Riot at Chester, it was suggested
on the Roll that one of the Sheriffs was a
Defendant, whereupon *Venire facias* issued

to the other Sheriff. The Defendant being found guilty, it was moved in Arrest of Judgment, that the *Venire facias* ought to have been directed to the Coroners, because both Persons make but one Sheriff; but the Objection was not allowed, for though one is challenged, the other may execute the Writ in the Name of both; the Coroners are not the proper Officers but where the Sheriff is absolutely improper, and not where there is no Sheriff at all; for if he dies, the Coroner cannot execute the Writ. In the Case of two Coroners, if one be challenged, the other may execute the Writs, yet both make out one Officer: So where there are two Sheriffs, if one be challenged, the other must act. *Pasch. 3 W. & M. Rex versus Warrington.* 1 *Salk.* 152. 4 *Mod.* 65, 66. *Carth.* 214. 1 *Show.* 327. *Comb.* 191. 2 *Mod.* 22.

If the *Venire* be awarded to the Coroners for a Default in the Sheriff, and they do nothing upon the Writ, upon a Default discovered in the Coroner of later Time, the Party may shew this to the Court, and if there be a new Sheriff made in the mean Time, may have a *Venire facias* to him, otherwise to Elisors.

In an inferior Court, where the Mayor and Bailiffs are Judges, the *Venire facias* may be awarded to and executed by the Bailiffs, notwithstanding they are Judges of the Court. *Cro. Car.* 138.

The

Where on
Suggestion
of Plaintiff
of Matter
containing
a principal
Challenge
to the She-
riff, &c.
the Coro-
ners, &c.
shall re-
turn the
Jury.

The Plaintiff, where he perceives any Matter that would be a *principal* Challenge for the Defendant to take to the Array, in case the Process to bring in the Jury should go to the Sheriff, &c. may, for the sake of expediting his own Cause, suggest that Matter to the Court on Record, and pray that the Process may be directed to the Coroners, &c. And if the Defendant admits the Suggestion to be true, Process shall go as the Plaintiff has prayed; but if the Defendant denies that the Suggestion is true, the Truth of it shall not be tried, but the Defendant's Denial of the Fact shall be entered on the Roll; and the *Venire facias* shall issue to the Sheriff; and the Defendant shall not be admitted to challenge the Array for that Matter which the Plaintiff suggested to the Court, but he may for any other Matter. *Bro. Chall.* 82, 89, 154, 178, 179. *Eyre versus Bannister, Moor* 894 *Hutt.* 24.

But Process to the Coroners, &c. shall not issue upon the Suggestion and Prayer of the Defendant, for if the Matter he would suggest be Kindred, &c. between the Sheriff and the Plaintiff, he may take Advantage of such principal Challenge when the Jury appears: And if the Plaintiff proceeds without removing the Objection he delays himself. *Bro. Chall.* 153. On the other Hand, if the Matter he would suggest be Kindred, &c. between the Sheriff and himself, it is for his Advantage and does not hurt him. *Jenk.* 115. *pl.* 28.

The

The Matter suggested by the Plaintiff in order to have Process to the Coroners, must contain a principal Challenge, and not a Challenge to the Favour. *Dyer* 367. *Bedforne versus Dandy*, *Hutt.* 25. *Cradock versus Wenlock*, *Hutt.* 26. *Gouldsb.* 42. *Cane's Case*, *Moor* 470. *Higgins versus Spicer*, *Moor* 623. 1 *Inst.* 157, 158. *Cro. Fac.* 547. *Jenk.* 115.

The Sheriff, &c. is not always at liberty to pick a Jury out of the whole County at large, but must take them out of Lists of Persons qualified, to be made by Officers appointed by the Law for that Purpose, which is also a great Help to the Sheriff, &c. who being but an annual Officer, might otherwise be under great Difficulties in returning great Numbers of Juries properly qualified, for want of knowing the Circumstances and Abilities of a sufficient Number of Inhabitants in the County.

Of Lists to be prepared by the Constables, &c. of Persons qualified to serve on Juries.

Constables, &c. to prepare Lists of Persons qualified to serve on Juries for Trials, and deliver them in to the Quarter Sessions.

Sheriff to return
ries out of
such Lists.

THAT Sheriffs may be the better informed of Persons to be returned, for the Trials of Issues joined in the Courts of Chancery, King's Bench, Common Pleas or Exchequer, or to serve on Juries at Assises, Sessions of *Oyer and Terminer*, general Gaol-Delivery and Sessions of the Peace; all Constables, Tithingmen and Headboroughs, shall yearly at the Quarter-Sessions, in the Week after *St. Michael*, upon the first Day of the Sessions, or upon the first Day that the Sessions shall be held by Adjournment of any particular Division, return a List of the Names and Places of Abode, of all Persons within the Places for which they serve, qualified to serve upon such Juries, with their Additions, between the Age of one and twenty Years and seventy, to the Justices; which Justices, or two of them at the said Sessions, shall cause the Lists to be entered by the Clerk of the Peace, amongst the Records of the Sessions; and no Sheriff shall impanel or return any Person or Persons, to try any of the issues joined in any of the said Courts, or to be or serve in any Jury at the Assises, Sessions of *Oyer and Terminer*, Gaol-Delivery or Sessions of the Peace,

Peace, that shall not be named in the said Lists. *Stat. 7, 8 Will. 3. c. 32. §. 4.*

The Justices of Peace for all the Counties within *England* and *Wales*, shall yearly at the Quarter-Sessions next after the twenty-fourth of *June*, issue their Warrants to the Head Constables of every Hundred, Lathe or Wapantake, requiring them to issue their Precepts to the Constables, Tithingmen and Headboroughs, requiring them to meet together with the Head Constables, within fourteen Days next after, at some usual Place, where the Constables, &c. shall prepare a List signed by them, of the Names and Places of Abode of all Persons within the Places for which they serve, qualified to serve on Juries according to the said Statute, 4 *Will. & M. c. 24.* with their Additions, between the Age of twenty one Years, and seventy Years, as by the *Stat. 7 W. 3. c. 32.* is directed, which List the Constable, &c. shall yearly at the Quarter-Sessions in the Week after *St. Michael*, upon the first Day of the Sessions, or upon the first Day the Sessions shall be held by Adjournment, at any particular Place, shall return to the Justices. *Stat. 3 & 4 Ann. c. 18. §. 5.*

Justices to
issue War-
rants to
High
Consta-
bles to
summon
Consta-
bles, &c.
to meet
and make
Lists of
Persons
qualified
to serve on
Juries for
Trials.
To be de-
livered to
the Quar-
ter-Sessi-
ons after
Michael-
mas.

The Persons required to make up Lists of the Names of Persons qualified to serve on Juries, shall on Request to any Parish Officer, who shall have in his Custody any of the Rates for the Poor or Land Tax, have Liberty to inspect such Rates, and take the Names of such Persons qualified dwelling within their Precincts. *Stat. Geo. 2. c. 25. §. 1.*

The Con-
stable, &c.
shall in-
spect
Books of
Rates, &c.

And

And shall
fix up Lists
at Church
Doors,
&c.

If a Per-
son not
qualified
be insert-
ed, to be
struck out.

Consta-
bles, &c.
may deli-
ver the
Lists to
the High
Constables,
who shall
deliver
them in
to the
Quarter-
Sessions.

Misbeha-
viour in
Persons

required to make Lists by unduly inserting or omitting Persons
or taking Money, &c. how to be punished.

And shall yearly, twenty Days at least
before *Michaelmas*, upon two *Sundays*, fix
upon the Door of the Church, within their
Precincts, a List of such Persons intended
to be returned, and leave a Duplicate of
such List with a Churchwarden or Over-
seer of the Poor; and if any Person not
qualified shall find his Name mentioned in
such List, and the Person required to make
such List shall refuse to omit him, the Ju-
stices at their Quarter-Sessions, on Satis-
faction from the Oath of the Party com-
plaining, or other Proof, shall order his
Name to be struck out. *Stat. 3 Geo. 2.*
c. 25. §. 1.

It shall be sufficient for any Constables,
Tithing-men, or Headboroughs, after they
have completed the Lists for their Precincts,
to subscribe the same in the Presence of
one Justice for each County, &c. and at
the same Time to attest the Truth of such
Lists, upon Oath, to the best of their
Knowledge or Belief; and the Lists shall
(being signed by the Justices) be delivered
by the Constables, &c. to the High Con-
stables, who are to deliver in such Lists to
the Quarter Sessions, attesting upon Oath
the Receipt of such Lists from the Constables,
&c. and that no Alteration hath been
made since their Receipt thereof. *Stat.*
3 Geo. 2. c. 25. §. 7.

If any Person, required to give in or
make up any such List, shall wilfully omit
any Person whose Name ought to be in

serted, or insert any who ought to be omitted, or shall take any Reward for omitting or inserting any Person, he shall, for every Person so omitted or inserted, forfeit 20 s. on Conviction before one Justice of the County, &c. where the Offender shall dwell, on the Confession of the Offender, or Proof by one Witness on Oath; one Half to the Informer, the other Half to the Poor of the Parish, &c. for which the List is returned; and if the Penalty shall not be paid within five Days, it shall be levied by Distress and Sale of Goods, by Warrant from one Justice; and the Justices before whom such Person shall be convicted, shall certify the same to the next Quarter-Sessions, which shall direct the Clerk of the Peace to insert or strike out the Name. *Stat. 3 Geo. 2. c. 25. §. 2.*

Any Head-Constable failing to issue his Penalty on Precept to meet with the Constables, &c. High Constable, &c. shall forfeit 10 l. and any Constable, &c. failing to meet the Head Constable, and failing to prepare a List, and to return the same to the Justices as aforesaid, shall forfeit 5 l. and every such High Constable, Constable, and Tithing-man, so offending, shall be prosecuted at the Assises, Sessions of Oyer and Terminer, or general Gaol-Delivery, or Sessions of the Peace. *Stat. 3 & 4 Anne, c. 18. §. 5.*

Duplicates of the Lists, when delivered at the Sessions, and entered by the Clerk of the Peace, shall, during the Sessions, or within ten Days after, be transmitted by the Clerk of the Peace to the Sheriff; and the Sheriff shall take care that the

D Names

Of preparing Lists

Names be entered alphabetically with their Additions and Places of Abode; and every Clerk of the Peace neglecting his Duty therein, shall forfeit 20*l.* to such Persons who shall prosecute for the same, till the Party be convicted upon an Indictment at the Quarter-Sessions. *Stat. 3 Geo. 2. c. 25. §. 2.*

The Return to the Justices shall be a good Excuse to the Sheriff for such Summons, &c.

And to the end that Sheriffs may not incur any Penalty or suffer any Damages by summoning or returning any Person, named in the List of Jurors transmitted to them by the respective Quarter-Sessions, for not having such Estates as qualify such Persons to be Jurors, the said Return to the Justices shall be a good Excuse for the Sheriff for such Summons and Returns; and if any Action shall be brought against any Sheriff for such Return, the Sheriff may plead the General Issue; and if the Plaintiff be nonsuited, &c. the Plaintiff or Informer shall pay treble Costs. *Stat. 7,*

Penalty on the Sheriff summoning and returning any Person not inserted in such Duplicate.

8 W. 3. c. 32. §. 6. If any Sheriff or Officer shall summon and return any Person to serve on any Jury, before the Justices of Assize, *Nisi Prius*, or Judges of the Great Sessions in *Wales*, or of the Sessions for the Counties Palatine, whose Name is not inserted in the Duplicates transmitted to him by the Clerk of the Peace; or if any Clerk of Assize, Judge's Associate, or other Officer shall record the Appearance of any Person so summoned and returned, who did not really appear, then any Judge of Assize, *Nisi Prius*, &c. shall upon Examination in a summary Way, set such Fines upon such Sheriff,

And on Officer falsely recording the Appearance of any Person not summoned.

Sheriff, &c. for every Person so summoned and returned, and for every Person whose Appearance shall be so falsly recorded, as the Judge shall think meet, not exceeding 10 l. nor less than 40 s. Stat. 3 Geo. 2. c. 25. §. 3.

Having shewn the Ends and Purposes for which Petit Juries were ordained and appointed; what Men are proper and qualified to serve on Juries; who are exempted therefrom, and who is to denominate, impanel, summon and return the Jury, and the Methods provided by Law for furnishing him with Lists of Persons qualified to serve on Juries; we shall now consider the Process or Award of the Court to the Sheriff for impanelling, summoning and returning a Jury, and the Manner of executing it.

Of the Process for impanelling a Jury.

When the Parties have joined Issue upon a Matter of Fact, a Writ of *Venire facias* issues to the Sheriff, commanding him to cause to come into the Court at a Day, appointed in the Writ, twelve free and lawful Men of the Body of his County, each of whom has ten Pounds by the Year of Lands, Tenements or Rents at the least, by whom the Truth of the Matter may be the better known, and who are in no wise of kin either to the Plaintiff or to the Defendant, to make a Jury between them.

Of the *Venire facias*.

The Num-
ber of Ju-
rors to be
summon'd.

There are several Things observable upon this Writ; first as to the Number, although the Sheriff is commanded to return only twelve Jurors; yet by the antient Course for the Expedition of Justice, the Sheriff was to return twenty-four; for, if twelve were to have been only returned, no Man would have had a full Jury appear or be sworn in respect of Challenges, without a Tales, which would have been a great Delay of Trials. 1 *Inst.* 155. a. Though the Sheriff returned a less Number than twenty-four, yet if a sufficient Number appeared and tried the Issue, it was aided by the Statute of Jeofails as a Mis-return. 5 *Co.* 36. *Cro. Eliz.* 587. *Cro. Car.* 233. By the Common Law in Civil Actions, the Sheriff might, if he would, return above twenty-four; and therefore by the Statute of *Westminster* 2. c. 38. reciting, that whereas the Sheriffs were used to summon an unreasonable Multitude of Jurors, to the Grievance of the People, it is ordained that from thenceforth in one Assise no more shall be returned than twenty-four. *Godb.* 370. 1 *Keb.* 310. But this Statute does not extend to Jurors returned for Trials on criminal Prosecutions. *Kel.* 16.

But now, every Sheriff, or other Officer, to whom the Return of the *Venire Facias Juratores*, or other Process for the Trial of Causes before Justices of Assise or *Nisi Prius* in England doth or shall belong, shall upon the Return of every *Venire facias* (unless in Causes intended to be tried at Bar, or where a special Jury shall be struck by Rule of Court) annex a Panel

to the Writ, containing the Names, Additions and Places of Abode of a competent Number of Jurors named in such Lists [*i. e.* except in the Lists mentioned before, Page 46.] the Names of the *same* Persons to be inserted in the Panel annexed to every *Venire facias*, for the Trial of Issues at the same Assises; which Number of Jurors shall not be less than forty-eight, nor more than seventy-two, without Direction of the Judges appointed to go the Circuit, or one of them, who are impowered and required, if he or they see Cause, by Order under his or their respective Hand or Hands to direct a greater or lesser Number; and then such Number, as shall be so directed, shall be the Number to serve on such Jury; and the Writs of *Habeas Corpora Juratorum*, or *Distringas*, subsequent to such Writ of *Venire facias*, need not have inserted in the Bodies of such respective Writs the Names of all the Persons contained in such Panel; but it shall be sufficient to insert in the mandatory Parts of such Writs respectively, these Words, *the Bodies of the several Persons named in the Panel annexed to this Writ*, or Words of the like Import, and to annex to such Writs respectively, Panels containing the same Names as were returned in the Panel to such *Venire facias*, with their Additions and Places of Abode, that the Parties concerned in any such Trials may have timely Notice of the Jurors who are to serve at the next Assises, in order to make their Challenges to them if there be Cause; and for the making the Returns and Panels

The She-
riff, &c.
Trials at
Bar or by
a Special
Jury, to re-
turn a
competent
Number
of Jurors
not less
than forty-
eight, nor
more than
seventy-
two, ex-
cept by Or-
&c.

aforsaid, and annexing the same to the respective Writs, no other Fee or Fees shall be taken than what are now allowed by Law to be taken for the Return of the like Writs and Panels annexed to the same, and the Persons named in such Panels shall be summoned to serve on Juries at the then next Assises or Sessions of *Nisi Prius* for the respective Counties to be named in such Writs and no other. *Stat. 3 Geo. 2. c. 25. §. 8.*

How Sheriffs in *Wales* shall return Jurors for Trials at the Court of Grand Sessions.

Every Sheriff or Officer to whom the Return of Juries in the Court of Grand Sessions in any County of *Wales* shall be long, shall at least eight Days before every Grand Sessions, summon a competent Number of Persons qualified out of every Hundred and Commote within such County, so as such Number be not less than ten, or more than fifteen, without the Direction of the Judge of the Grand Sessions, by Rule of Court; and the Officer shall return a List containing the Names of the Persons so summoned the first Court of the second Day of every Grand Sessions; and the Persons so summoned, or a competent Number of them, as the Judges shall direct, and no other shall be named in every Panel to be annexed to every *Venire facias*, *Habeas Corpora*, and *Distingas*, for the Trial of Causes in such Grand Sessions. *Stat. 3 Geo. 2. c. 25. §. 9.*

How Sheriffs in Counties Palatine shall return Juries for Trials at the Sessions.

Every Sheriff or Officer to whom the Return of the *Venire* for the Trial of Causes before the Justices of the Sessions, for the Counties Palatine of *Chester*, *Lancaster*, or *Durham*, doth belong, shall, fourteen Days

Days at least before the Sessions, summon a competent Number of Persons, so as such Number be not less than forty-eight, nor more than seventy-two, without the Direction of the Judges; and shall, eight Days at least before such Sessions, make a List of the Persons so summoned; and such Lists shall be hung up in the Sheriff's Office; and the Persons named in such Lists, and no others, shall be summoned to serve on Juries at the next Sessions; and the Sheriff is to return such List on the first Day of the Sessions; and the Persons so summoned, or a competent Number of them, as the Judges shall direct, and no other, shall be named in every Panel to be annexed to every *Venire, Habeas Corpora*, and *Distringas*, in such Sessions. *Stat. 3 Geo. 2. c. 25. §. 10.*

The Precept that issues before a Sessions of Gaol-Delivery, *Oyer* and *Terminer*, and of the Peace, is to return twenty-four, and commonly the Sheriff returns forty-eight. But the Award or Precept to try the Prisoner after he has pleaded is only for twelve, and twenty-four are returned by the Sheriff on that Panel. 2 *Hale's H. P. C.* 263. Upon criminal Prosecution on the Crown Side in the Court of King's Bench, the Sheriff may be commanded to return any Number the Court shall please, and in Sir *Harry Vane's* Case the Court ordered the Sheriff to return sixty. *Kel. 16.*

The Words *Free and lawful Men*, in the Writ, exclude Aliens, Minors, Villains, Outlaws and infamous Persons, or such as

have been adjudged to any corporal Punishment, from being of the Jury. 1 *Inst.* 6. *b.* 156, 157. 7 *Co.* 18. of which Matters we have treated before, Page 32, 33.

The Words *each of whom has ten Pounds by the Year, &c.* shew what Estate the Juror ought to have, and are to be adapted to the Nature of the Case. Of this also we have treated before, Page 23, &c.

The Words *by whom the Truth of the Matter may be the better known, and who are in no wise of Kin either to the Plaintiff or to the Defendant*, contain all Causes of Objection from Impartiality or Incapacity, Consanguinity and Affinity; which have been shortly touched upon before, and shall be more fully treated of under the Head of *Challenges to the Polls.*

Justices of
Gaol-Del-
ivery
and of
the Peace
may have
a Jury re-
turned by
their A-
ward;

But Justi-
ces of Oyer
and Termi-
ner may
not.

Justices of Gaol-Delivery (except they have a special Commission) and also Justices of Peace may have a Panel returned by the Sheriff by their bare Award without any Precept or Writ of *Venire facias*: because, before their Coming, they make a general Precept to the Sheriff in Parchment under their Hands and Seals to summon twenty-four Men out of every Hundred, &c. to do those Things which shall be enjoined them on the King's Behalf; and therefore it is to be presumed that there are a sufficient Number present in Court, whom the Sheriff may return immediately, whenever the Court shall have Occasion for them. But Justices of Oyer and Terminer, though they make a Precept to the Sheriff before they hold their Sessions, with

with the like Clause in it for returning before them twenty-four Men out of each Hundred at the Day of their Sessions, must make a particular Precept to the Sheriff under their Hands and Seals to return a Jury for Trial of an Issue joined before them, and cannot have it returned by their bare Award. 2 *Inst.* 568. 3 *Inst.* 168. *Dyer* 118. 1 *Sid.* 364. 2 *Hale's H. P. C.* 260, 261. 2 *Hawk. P. C.* 405, 406.

Justices in *Eyre* or of Gaol Delivery may order a Jury to be returned immediately for the Trial of a Prisoner; and it has been adjudged, that Justices of *Oyer* and *Terminer*, or of the Peace, may for the Trial of an Issue joined before them, award a *Venire* returnable the same Day on which the Party is arraigned; though it is said there are strong Authorities to the contrary unless the Prisoner consents or the Crime amounts to Felony. 2 *Hawk. P. C.* 406. On a Commission of *Oyer* and *Terminer*, there goes out a general Precept in the Names of three or more of the Commissioners, and under their Seals fifteen Days before the Sessions, directed to the Sheriff to return twenty-four Jurors to try the Issues between the King and the Prisoners to be arraigned; yet this is but preparatory, and to have a Jury in Readiness; for after the Prisoners are arraigned and have pleaded to the Country, a Precept ought to issue to the Sheriff in the Nature of a *Venire facias*, which may bear Teste the same day the Prisoners pleaded, commanding the Sheriff to re-

turn a Jury upon such a Day. 2 *Hale's H. P. C.* Or they may make the Precept returnable the same Day that the Prisoner pleads, viz. at one of the Clock in the Afternoon, &c. for Justices of Oyer and Terminer may take their Indictment, and arraign the Prisoner and try him the same Day. *Ibid.* And Justices of the Peace, as to the Point of their Precepts of *Venire facias*, agree with Justices of Oyer and Terminer, for they are, as to this Purpose, Commissioners of Oyer and Terminer, and may take the Indictment, arraign, and try the Prisoner the same Day, in Cases of Felony. 2 *Hale's H. P. C.* 261, 262.

Process to bring in the Jury may be returnable immediately into the King's Bench for the Trial of an Indictment found in the County where it sits, and whether for a Crime in such County, or for a Treason beyond Sea; but for the Trial of an Indictment removed by *Certiorari* from a different County, there must be fifteen Days between the Teste and Return of every Process. 2 *Roll. Abr.* 626. 9 *Ca.* 118. b. 2 *Inst.* 568. 2 *Hawk. P. C.* 406. 2 *Hale's H. P. C.* 260.

As to the Return of the Writ, in Causes depending in the superior Courts, the Jury is not summoned upon the *Venire facias*, though the Sheriff returns it as actually executed, with a Panel of Juror's Names annexed; after which, on a Supposition that the Jury was summoned, but did not appear at the Day named in the Writ, the Courts send farther Process to the

the Sheriff for bringing in the Jury; in the Court of Common Pleas the Process is a *Habeas Corpora Juratorum*, but in the Courts of King's Bench and Exchequer the Process is a *Distringas*, which is the strongest Process, because in these Courts the King is more immediately concerned; and upon this last Process the Sheriff summons the Jury.

The Appearance of Juries from all the Counties of *England* in these superior Courts occasioned a great Conflux of People, and was very expensive and grievous both to the Jurors and to the Suitors; and therefore by the Statute of *Westm.* 2. c. 30. all Pleas in either Bench, which require only an easy Examination, shall be determined [that is tried] in the Country before the Justices of Assise, by Virtue of a Writ directed by that Statute called a Writ of *Nisi Prius*. 2 *Inst.* 421, 422. 4 *Inst.* 159. *Cro. Car.* 349.

This Writ of *Nisi Prius* takes its Name from those two Words being used in the Award of the Writ, which commands the Sheriff to have the Jury in the superior Court at a certain Day named in the Writ, *nisi* the King's Justices of Assise *prius venerint* at the Day of the Assises, at the Place where the Assises are held for the County in which the Fact is supposed to be done; that is, the Sheriff is to have the Jury to try the Cause either at the Assises or in the superior Court on a future Day; and therefore the Jury's appearing before the Justice of Assise is an Excuse for their appearing at the future Day in the superior Court.

The Writ
of Nisi
Prius.

Of the Process for

Court. Actions laid in *Middlesex* may be tried by *Nisi Prius* in *Westminster Hall*. *Stat. 18 Eliz. c. 12.* Either in Term or within eight Days after Term. *Stat. 12 Geo. 1. c. 31.*

A Cause cannot be tried at Bar where it is laid in *London*, by reason of their Charter. 2 *Salk.* 644.

From the Statute of *Westminster 2.* which was 13 *Ed. 1.* till the 42 *Ed. 3.* the *Nisi Prius* Clause was in the Writ of *Venire facias*; and if the Jury appeared neither at the Assises nor in the superior Courts, there issued out a *Habeas Corpora* or *Distingas* to bring them up; but these two Inconveniencies which arose by inserting the *Nisi Prius* Clause in the *Venire Facias*, the one was the Defendant's being effoinable upon the *Venire Facias*, because if he did not appear at the Assises, the Jury were not obliged to appear afterwards in the superior Court; the other Inconveniency was, that the Parties not seeing the Panel before-hand could not be prepared to make their Challenges. The first of these Inconveniencies was in a great Measure remedied by laying the Costs on the Defendant if the Plaintiff prevailed; but the second found no Remedy till the Statute 42 *E. 3. c. 11.* whereby it was enacted, that no Inquests but Assises and Gaol-Deliveries should be taken by *Nisi Prius*, or other Manner, at the Suit of Great or Small, before that the Names of all them that shall pass in the Inquest be returned into the Court. [N. By the Statute 7 *W. 3. c. 3. §. 7.* every

ry Person indicted for High Treason or Misprision of High Treason shall have a Copy of the Panel of the Jurors, who are to try him, duly returned by the Sheriff and delivered unto him two Days at the least before his Trial.] This Statute 42 E. 3. c. 11. set the Jury Process on the Foot it now stands; for afterwards the *Nisi Prius* Clause could not be inserted in the *Venire*, as was directed by the Statute of *Westminster* 2. because the Statute 42 Ed. 3. enacted that no Inquest should be taken at *Nisi Prius* until the Inquest be returned into Court, and therefore the *Nisi Prius* Clause was taken out of the *Venire Facias*, and inserted in the *Habeas Corpora* and *Distringas*, which is so awarded on the Roll in the *Jurata*; and the doing this produced many good Effects: First, the Plaintiff and Defendant thereby knew the Names of the Jury, by which Means they might inquire after the Jury, and at the Trial be the better enabled to make their Challenges. Secondly, the *Venire Facias* being returned, the Defendant was not essoinable on the *Habeas Corpora* and *Distringas*, but was obliged to appear, or else by the Statute of *Westminster* 2. the Inquest was taken by Default as if he had appeared; and this prevented great Delay to the Plaintiff. Thirdly, the Jury on the *Nisi Prius* were fineable if they did not appear, and since they could fine them on this Process according to their Offence, they granted the *Nisi Prius* in the ensuing *Habeas Corpora* or *Distringas*, and did

did not compel the Jury to try it at Bar in the superior Court, which was more convenient than the antient Way, where the appearing Juror was obliged by his Companions Default to come up to *Westminster*, but now every one has Issues returned upon him for his own Default. 2 *Inst.* 423.

The Day at *Nisi Prius* and the Day in Bank (*i. e.* the Day the Jury are to appear in the superior Court in Default of their appearing on the *prior* Day at *Nisi Prius*) are in Consideration of Law the same; because the Authority of the Judge of Assise given by the Writ of *Nisi Prius*, to try the Cause in the Country is the same as the Courts, and therefore the *posse* certified by him on the Day in Bank is the same as if the Jury had come to the Court and tried the Cause there; and this is for the Ease of the Subjects, that the Jury and Witnesses may not come out of their proper Counties. 6 *Mod.* 9.

Power of
the Justices
of *Nisi*
Prius.

Justices of *Nisi Prius* have Power to amerce the Jurors, and to punish them for Misdemeanors. They may punish a Man for committing a Trespass in their Presence. *Viner*, Tit. *Trial* 197. *pl.* 7, 8. They may do whatever is necessarily incident to the Trial, as to take a Challenge to the Array, or to a Juror or Witness, &c. And by subsequent Acts of Parliament they have Power to give Judgment in some particular Cases, as Felony, Treason, *Quare Impedit*. 12 *Mod.* 652. See per *Holt C. J.* if a Judge of *Nisi Prius* allow or disallow a Challenge, it is all *sub modo*; for

for if he allows it when he ought not, or disallows it when he ought to allow it, and that appears on the *Postea*, the Trial shall go for nothing; but as to Things of Necessity he is to allow them, as of Pleas after the last Continuance, as a Release, &c. because the Defendant has no Time to plead it but at *Nisi Prius*; and in such Case all he has to do is to receive the Plea, and return it upon the *Postea*, for the Judges of the Court above to judge of. He may record a Demurrer to a Challenge. *Ibid.* 653, 654. 1 *Raym.* 717.

An issue joined in the King's Bench upon an Indictment or Appeal, whether for Treason or Felony, or a Crime of an inferior Nature, committed in a different County from that wherein the Court sits, may be tried in the proper County by Writ of *Nisi Prius*, by Virtue of the *Stat. Westm.* 2. c. 30. *Cro. Car.* 348. 2 *Inst.* 424. 4 *Co.* 43. 4 *Inst.* 160. *T. Raym.* 367. 6 *Mod.* 246. But as the King is not expressly named in this Statute, and it being a general Rule that he shall not be bound by a Statute which doth not expressly name him, it seems to have been the general Opinion, that wherever the King is a Party, it is irregular to grant a Trial by *Nisi Prius* without his special Warrant, or the Assent of his Attorney General. 2 *Leon.* 110. 6 *Mod.* 123. On an Indictment of Barretry, which seems to require great Examination, the Court refused to grant a Trial by *Nisi Prius* at the Motion of the Attorney General, till the King by his Letters had signified

Of Trials at Bar.

signified his Pleasure that it should be so tried. *Cro. Car.* 341. On an Appeal the Court may grant a Trial by *Nisi Prius* in the same Manner as in any other Action; but not where the Jury is to come from two Counties. *Dyer* 46. *pl.* 6. 24 *E.* 3. 22, 23. *b.* 28, 48. 25 *E.* 3. 39. *Bro. Droit de recto* 14. *Nisi Prius* 16, 17, 35. *Prerogative* 108. *F. N. B.* 15. 6 *Mod.* 247.

Of Trials at Bar.

Of grant-
ing Trials
at Bar. **I**N some Cases the Court where the Cause is depending will order it to be tried at the Bar of the Court, and not send it to be tried at *Nisi Prius*; as where the Cause is of Value or Difficulty, and there the Court is bound of common Right to grant Trials at Bar. *Inquisitiones de grossis & pluribus articulis, quæ magna indigeant examinatione capiuntur coram iudiciariis de Bancis.*

On Ac-
count of
the Value
and diffi-
culty of
the Cause.

Yet in an Ejectment for Lands of 3000*l.* *per Annum* Value, the Court refused to grant a Trial at Bar, because there was nothing to do but to prove the Executing a Conveyance. 2 *Salk.* 648.

And on Motion for a Trial at Bar, the Court laid down two Rules; that they never grant these Trials merely for the Consequence of the Cause, though it be of ever so great Value; nor even for the length of Examination, where it is of very small Value. And in Ejectments the Rule has been not to allow them, but where
the

the yearly Value of the Land in Question is 100*l*. And the Court said likewise that a general Swearing of the Length of a Cause, though there is Value too, will not be sufficient, unless there is a probable Foundation laid for them to believe it. *B. R. 1 Barnard. 141.*

The Court refused to grant a Trial at Paupers. Bar because the Plaintiff was poor, unless the Defendant would agree to take *Nisi Prius* Costs. 2 *Salk. 644.* But by Favour of Court, one may have a Trial at Bar though he sue *in forma pauperis.* *Mich. 11 W. 3. Sherwin versus Clarges, 12 Mod. 318.*

If one of the Justices of the Benches or Officers of a Master in Chancery is concerned, it is a the Courts. good Cause for a Trial at Bar, be the Value what it will. 1 *Sid. 407.* And the Court said it was never refused to any Officer of the Court, nor hardly to any Gentleman at the Bar. *Hill. 2 Ann. B. R. Sir Samuel Astrey's Case, 2 Salk. 651.*

On a Motion for a Trial at Bar, in an The Indictment of Perjury, urging that it was King. the King's Case; the Chief Justice said, the King was no otherwise concerned in it, than in Maintenance of the common Justice of the Realm. It was usually the Subjects Interest and his Prosecution, and not to be resembled with Causes, wherein the King is concerned in Point of Interest, and therefore they must not deviate from the Course in civil Causes. 1 *Vent. 74.* On an Indictment for forging an Indorsement on a Note for 800*l*. the Attorney General mentioned that it might be tried at Bar
the

the next Term, but because it was not carried on by the Direction of the Crown, though the King's Name be made use of, the Court hesitated. Judge *Probyn* said, that this being a Forgery of a Note of Hand, concerned Public Credit in general, and therefore he did not know but this Case in its Consequence might differ something from others. However the Motion was afterwards granted on the Attorney General's saying that he had got the King's Command to carry on this Prosecution. *Mich. 2 Geo. 2. B. R. 1 Barnard. 88. Rex versus Hales.*

Of ordering Special Juries.

Special
Juries
how ap-
pointed.
Style 477.
12 Mod.
94, 224.

ON Motion and Application by either Party, the Court will order that the Sheriff shall at the Expence of the Party who makes the Application, attend the proper Officer of the Court with the Book of the Freeholders of the County, and that the proper Officer in the presence of the Attornies of both Parties shall name thereout forty-eight Freeholders, of whom twelve shall be struck out on each side, and that the remaining twenty-four shall be returned by the Sheriff to try the Issue.

The twelve to be struck out on each side, are to be struck out by one, at a Time, the Plaintiff's Attorney beginning first. 2 *Lilly's P. R.* 122, 123.

If the Attorney of the one Party does not attend to strike out twelve, having had

had Notice, the proper Officer shall strike out twelve for him. *Lilly P. R. 127. Salk. 405. 12 Mod. 94.*

Some Doubts having arose touching the Power of the Courts at *Westminster*, to appoint Juries to be struck before the proper Officers of those respective Courts, for the Trial of Issues depending there, without the Consent of the Prosecutors or Parties concerned, unless such Issues are to be tried at the Bars of the said Courts; it is enacted, That His Majesty's Courts In what of King's Bench, Common Pleas and Ex- Cases spe- chequer at *Westminster*, upon Motion made cial Juries in Behalf of His Majesty, or on the Mo- may be tion of any Prosecutor or Defendant, in ordered. an Indictment or Information for any Misdemeanor or Information in the Nature of a *Quo Warranto* in the King's Bench, or in any Information in the Exchequer, or on Motion of any Plaintiff or Defendant in any Cause depending in the said Courts) are required to order a Jury to be struck before the proper Officer for the Trial of any Issue, in such Manner as special Juries are usually struck in such Courts upon Trials at Bar. *Stat. 3 Geo. 2. c. 25. §. 15.*

The Person who shall apply for such Who shall Jury shall pay the Fees for striking it, pay the and shall have no Allowance for the same Fees of or Taxation of Costs. Same *Stat. §. 16.* striking.

Where a special Jury shall be ordered How spe- by Rule of Court, in any Cause arising in cial Jury a to be struck

in a Cause arising in a City or Town and County.

a County of a City or Town, the Sheriff shall be ordered by such Rule to bring the Books of Persons qualified to serve on Juries within the same, in like Manner as the Freeholders Book hath been usually ordered to be brought in order to the Striking of Juries for Trials at Bar, and the Jury shall be struck out of such Books. *Same Stat. §. 17.*

When Special Juries, for the Counties Palatine of *Chester*, *Lancaster* and *Durham*, upon Motion on Behalf of his Majesty, or of any Prosecutor or Defendant in any Indictment or Information for Misdemeanors, or on the Motion of any Plaintiff or Defendant, may, in case they think fit, order a Jury to be struck before the proper Officer of each Court, in such Manner as Special Juries have been usually struck in the Courts at *Westminster* upon Trials at Bar. *Stat. 6 Geo. 2. c. 37. §. 2.*

No special Juries in Cases of Treason or Felony, because it would take from the Prisoner the Advantage of peremptory Challenges. *2 Jones 222. Viner, Tit. Trial 301. pl. 4, 5.*

Whether the Party, Jury, when the Parties attended the proper Officer to strike the Jury, the Defendant artfully struck out all the Hundredors named by the Officer; and at the Affises challenged the Array for Default of Hundredors, which Challenge the Judge of Assise allowed; but the Rule being made by the Defendant's Consent, this Challenge was held to be a Contempt of the

the Court, for which an Attachment was granted against the Defendant. *Pasch. 10 Geo. 1. Rex versus Burridge. 1 Mod. Cases L. & E. 245.* But on a Trial of a *Quo Warranto*, the Defendant having challenged the Array of a Special Jury, which had been struck at his Request, for Partiality in the Sheriff, an Attachment was moved for, and the Case next above was cited; but the Court refused to grant the Attachment, and said, that the Attachment in that Case was granted by reason of the Abuse of the Rule; but here the only Foundation is the Jury's being so struck at his Request, which alone is not sufficient; for he had a Right to challenge the Array on the Process being directed to a wrong Officer, and the Rule might have been fulfilled another Way, *viz.* as the Sheriff was partial, a proper Entry might have been made, and Process directed to the Coroner. *Mich. 8 Geo. 2. B. R. The King against Johnson.*

Of the Defendant's suing out the Venire facias by Proviso.

ISSUE being joined, and the Parties Of the *Venire facias* having put themselves upon the Coun-
try, the Process for bringing in the Jury by Pro-
viso is open as well to the Defendant as to
the Plaintiff, either upon the Plaintiff's
Default of proceeding to Trial, or, in
such Actions wherein the Defendant is an
Actor

Actor as well as the Plaintiff, without any Default in the Plaintiff.

When the Process is sued out by the Defendant, it is called a *Venire facias* by *Proviso* from the following Clause in it, *viz. Provided always, that if two Writs shall thereupon come to you, you shall only execute and return one of them.* For it might happen, that both Parties might sue out a *Venire facias* at the same Time, neither knowing that the other had sued one out; or doubting whether he would proceed upon it, notwithstanding he had sued it out.

On the Plaintiff's Neglect of proceeding to Trial. If the Plaintiff after Issue joined neglects to bring on the Cause to Trial the first Assises, the Issue being triable there; or the first Term, or the Sittings after the first Term, the Cause of Action arising in *Middlesex* or *London*, the Defendant is at Liberty to bring down the Cause by *Proviso*; for both Plaintiff and Defendant having put themselves upon the Country, the Plaintiff's Laches shall not prevent the Defendant discharging himself from the Action. *G. Hist. C. B. 74.*

Without his Neglect.

In Actions wherein the Defendant is an Actor as well as the Plaintiff, and is in Nature of a Plaintiff, the Defendant may carry down the Cause by *Proviso* without any Laches in the Plaintiff; or he may sue out Process in the same Manner as the Plaintiff without any Clause of *Proviso.* 21 H. 6. 22 Bro. Avovery 54. 2 Hawk. P. C. 407, 408.

As in Replevin, 21 H. 6. 22 Bro.
Avovery 54. 16 H. 7. 14. Bro. *Nisi Prius*
40. 2 Brownl. 276. Het. 79. 2 Salk.
652. 2 Lev. 5. 2 Saund. 335. 2 Keb.
752. In Prohibition, 2 Brownl. 276.
2 Salk. 652. 2 Hawk. P. C. 407, 408.
In Error, 2 Lev. 5. 2 Saund. 335. 2 Keb.
752. In *Quare Impedit*, 2 Salk. 652.
2 Hawk. P. C. 407, 408. Sed 33 H. 6.
13, 14. Bro. *Nisi Prius* 2. contra. If the
Plaintiff in a Detinue, and the Garnishee
are at Issue, and the Plaintiff prays a *Nisi Prius*,
and it is granted to him, yet the Garnishee at the
same Time may have *Nisi Prius* with *Proviso*, because he is
Plaintiff also. 19 H. 6. 46. 2 Roll. Abr.
629. (R. b.) pl. 1. But the Garnishee shall not
put in his Writ, if the Plaintiff will put in his.
19 H. 6. 47. Bro. *Nisi Prius* 14. The Defendant
may sue out a *Venire facias* by *Proviso*, not only
where the Plaintiff has neglected to sue it out in
due Time, but also where he has delivered it to
the Sheriff too late for him to execute it, or where
the Plaintiff has neglected to get it returned, or to
file it; and where the Plaintiff has neglected to
sue the proper subsequent Process, as *Distringas*,
or *Habeas Corpora*, the Defendant may sue out
such Process by *Proviso*; but there are Authorities,
that where the Defendant has sued out a Process
by *Proviso*, the Plaintiff is to sue out the
subsequent Process upon it, in the same Manner
as if he had sued out the first, and that it is
irregular for the Defendant to sue out such
subsequent Process

Process until the Plaintiff has made Default in suing out the like Process. 2 Roll. Abr. 666. Keilw. 176. pl. 11. Dyer 215. pl. 51, 284. pl. 34. Cro. Car. 484. 2 Jones 34. Dyer 193. pl. 28, 318. pl. 10. 2 Lev. 5, 6. 2 Saund. 336. 6 Mod. 246. 1 Keb. 101. pl. 101. Ney 113. 2 Hawk. P. C. 407, 408.

By the Statute 7 & 8 W. 3. c. 32. 6. 1. which impowers a Plaintiff, who has sued out a *Venire facias* and a *Distingas*, or *Habeas Corpora*, but has not proceeded to Trial thereon, to sue a new *Venire facias*; it is enacted, that if any Defendant or Tenant in any Action depending in any of the Courts at *Westminster*, shall be minded to bring to Trial any Issue joined against him, when by the Course in any of the said Courts he may lawfully do the same by *Proviso*, such Defendant or Tenant shall or may, of the issuable Term next preceding such intended Trial to be held at the next Assises, sue out a new *Venire facias* to the Sheriff in Form aforesaid by *Proviso*, and prosecute the same by Writ of *Habeas Corpora* or *Distingas* with a *Nisi Prius*, as though there had not been any former *Venire facias* sued out or returned in that Cause, and so *toties quoties* as the Matter shall require.

It seems agreed, that neither in Actions wherein the King is a sole Party, nor in Indictments, there can be any Process taken out by *Proviso*, because no Laches can be imputed to the King. Also, it hath been questioned, whether there

there can be any such Process in Informations *Qui tam*, &c. because the King is in some Sort a Party. 2 *Hawk. P. C.* 407, 408. 2 *Leon.* 110. *pl.* 144. 1 *Sid.* 316. *pl.* 2. 2 *Salk.* 652. *pl.* 32. 6 *Mod.* 245. 11 *Mod.* 33. 1 *Keb.* 195.

Serjeant *Hawkins* says he takes it to be agreed, that Process by *Proviso* may be awarded in any Appeal, whether capital, or not capital, in the same Manner as in other Actions, after the Appellant has made Default in relation to the very same Kind of Process; and therefore if the Appellant after Issue joined, either neglects to take out any *Venue* the same Term, &c. or takes one out, but doth not get it returned, it seems that the Defendant may take one out by *Proviso*, &c. and so if the Appellant make the like Default in suing out a *Habeas Corpora*, or other subsequent Process, the Defendant may sue out the like Process by *Proviso*. 2 *Hawk. P. C.* 407, 408. *Kelw.* 176. *pl.* 70.

In what Cases the Jury shall have the View.

AT Common Law in most real Actions, after the Demandant had counted, the Tenant might have demanded the View of the Land; or, if it were a Rent or other Thing issuing out of Land, View of the Land out of which it issued; and this was to the End that Things
E might

might be reduced to a greater Certainty; but because this was used after by the Tenant for Delay, and thereby the Demandant greatly prejudiced,

By the Statute of *Westm. 2. c. 48.* it is enacted, That from thenceforth View shall not be granted, but in case when View of Land is necessary. And if one lose Land by Default, and he that loseth, moveth a Writ to demand the same Land, and in case when one by an Exception dilatory abateth a Writ after the View of the Land, as by Non-tenure, or misnaming of the Town, or such like, if he Purchase another Writ, in this Case, and in the Case before mentioned, the View shall not be granted, if he had View in the first Writs. In a Writ of Dower, where the Dower in Demand is of Land that the Husband aliened to the Tenant or his Ancestors, where the Tenant ought not to be ignorant what Land the Husband did alien to him or his Ancestors, though the Husband died not seised, yet View shall not be granted to the Tenant. In a Writ of Entry also, that is abated because the Demandant misnamed the Entry, if the Demandant purchase another Writ of Entry, if the Tenant had View in the first Writ, he shall not have it in the second. In all Writs also where Lands be demanded by reason of a Lease made by the Demandant or his Ancestor unto the Tenant, and not to his Ancestor, as that which he leased to him being within Age, not whole of Mind, being in Prison
and

and such like, View shall not be granted ; but if the Demise were made to his Ancestor, the View shall lie as it hath done before.

Since this Statute, the Demandant, as to any of the Cases therein contained, may counterplead the View, that is, alledge Matter in Pleading which bars him of the View ; as where he, that loseth Land by Default, brings a *Quod ei desorceat* for the Recovery of it, the Tenant shall not have View, because he is well enough ascertained of the Land by the former Record ; so where View was had in a former Writ, and that Writ was abated after View for some Mistake that appeared upon the View, as Non-tenure, Misnaming of the Town ; so in Dower, when it is brought against the same Tenant that purchased the Land of the Husband ; so if the Husband died seised it is a good Counterplea of View in Dower. *Booth 37.*

Wherever the Plaintiff is to recover by View of the Jurors, there ought to be six of the Jurors that have had the View, or know the Land in Question, so as to be able to put the Plaintiff in Possession if he recover. *1 Inst. 158. b.*

If the Court make a Rule, that the Jury shall have a View, and that they shall not hear any Evidence thereupon, and they notwithstanding hear Evidence, this is a good Cause of Challenge, and likewise a Misdemeanor for which it is said they may be punished by the Court. *Palm. 363.*

When in order for a View the last Juror is withdrawn, the Plaintiff shall take out a new *Distringas*, *amoro* the last Man of the Panel, to distrain the other twenty-three, with an *Apponas etiam decem tales*. 2 *Salk.* 665. At the Assises if a View be demanded, it must be after the Jury sworn, and then by Consent a Juror may be drawn. * *Et per Holt* Chief Justice, it may be without Consent; and notwithstanding such View, a Juror may be challenged when he comes to be sworn. 6 *Mod.* 211.

It is said that before the Court makes a Rule for a View, the *Venire facias* must be returned; and then the Court may make a Rule, that so many of the Panel shall have the View; *per Holt* Chief Justice a Jury is never ordered to View before their Appearance, unless in an Assise. 2 *Salk.* 665. 1 *Mod.* 41.

A View is grantable in such Cases where the Title is in Question; and in such Case it may be granted on Motion, on a bare Suggestion without any Affidavit. 2 *Salk.* 665.

When a View necessary, special Writs to be ordered.

In any Actions in any of Her Majesty's Courts at *Westminster*, where it shall appear to the Court, that it shall be necessary that the Jurors should have the View of the Place in Question, the Courts may order special Writs of *Distringas*, or *Habeas Corpora*, by which the Sheriff or other Officer shall be commanded to have six out of the first twelve of the Jurors, or some greater Number, at the Place in Question, some convenient

Time

Of summoning the Jury.

77

Time before the Trial, who shall have the Matters in Question shewn to them by two Persons in the Writ named, to be appointed by the Court. *Stat. 4 & 5 Ann. c. 16. §. 8.*

Where a View shall be allowed, six of the Jurors or more (who shall be consented to on both sides; or if they cannot agree shall be named by the proper Officer of the Court; or, if need be, by a Judge, or by the Judge before whom the Cause shall be brought on to Trial) shall have the View, and shall be first sworn, or such of them as appear on the Jury, before any drawing; and so many only shall be drawn to be added to the Viewers as shall make up the Number of twelve. *Stat. 3 Geo. 2. c. 25. §. 14.*

Viewers
how to be
appointed.

Of summoning the Jury.

THE Sheriff's summoning Bailiff delivers to each Juror returned by the Sheriff, or leaves at his Place of Abode, as hereafter is mentioned, a Notice in Writing, signifying the Time, the Court, and on what Occasion such Juror is to attend.

Every Summons of any Person qualified to the aforesaid Services, shall be made by the Sheriff, his Officer or Deputy, six Days before at least, shewing to every Person so summoned the Warrant under the Seal of the Office; and in case any Juror be absent from his Habitation, No-

In what
Manner,
and how
Sheriff to
summon
juries.

tice of such Summons shall be given, by leaving a Note in Writing under the Hand of such Officer, containing the Contents thereof, at the dwelling House of such Juror, with some Person there inhabiting. *Stat. 7 & 8 Will. 3. c. 32. §. 5.*

This Act shall not give any longer Time for the summoning of Juries to try any issues that are triable by Jurors of *London* or *Middlesex*, than was required before; nor shall give any longer Time for the Return of any Writ of *Venire facias*, *Habeas Corpora* or *Distingas*; but where there shall not be six Days between the Awarding of such Writ and Return thereof, every Juror may be summoned, attached or distrained, as he might have been before the said Act. *Stat. 7 & 8 W. 3. c. 32. §. 11.*

The Sheriff, &c. not to take any reward for excusing any Person from serving on Juries.

No Sheriff or other Person shall take any Reward, to excuse any Person from serving on Juries; and no Officer appointed to summon Juries, shall summon any Person other than such whose Name is specified in a Mandate signed by the Sheriff, &c. And if any Sheriff or Officer shall wilfully transgress in the said Cases, any Judge of Assise, &c. may on Examination and Proof of such Offence, in a summary way, set a Fine on any Person so offending, not exceeding 10 *l.* *Stat. 3 Geo. 2. c. 25. §. 6.*

Within what Time Jurors, having served on Trials,

No Persons shall be returned as Jurors at any Assises, or *Nisi Prius*, or shall be compelled to serve again.

at any of the said Great Sessions, or at the Sessions for the said Counties Palatine, who have served within one Year before in the County of *Rutland*, or four Years in the County of *York*, or within two Years in any other County, not being a County of a City or Town. And if any Sheriff shall wilfully transgress therein, any Judge of Assise, &c. is required on Examination and Proof of such Offence, in a summary Way, to set a Fine upon such Offender, not exceeding 5*l.* Stat. 3 Geo. 2. c. 25. §. 4. This Clause shall not extend to the County of *Middlesex*. No Person shall be returned to serve as a Juror at *Nisi Prius* in *Middlesex*, who has been returned at *Nisi Prius* in the said County in the two Terms or Vacations next preceding, under such Penalty upon the Sheriff, &c. as might have been inflicted for any Offence against the said Clause. Stat. 4 Geo. 2. c. 7. §. 1, 2.

Every Sheriff, &c. shall register the Names of such Persons as shall be summoned and serve as Jurors at any Assises, &c. alphabetically, and the Times of their Services; and every Person so summoned and serving, shall, upon Application to the Sheriff, &c. have a Certificate testifying his Attendance, which the Sheriff, &c. is to give without Fee; and the Book shall be transmitted by the Sheriff, &c. to his Successor. Stat. 3 Geo. 2. c. 25. §. 5.

Sheriff to register the Names of Persons summoned and serving, and give Certificate thereof gratis.

And whereas divers Persons within the County of *York*, liable to serve on Juries at

Assises and Sessions of the Peace (having very considerable Estates in Freehold and Copyhold) for their own Ease used to prevail with the Sheriffs to be returned and summoned to the Service of the Sessions being nigh their own Habitations and the Attendance there short, which often necessitated Men of meaner Estates to be on Juries at the Assises than otherwise might and ought to be, where the considerablest Men of Estates liable to the said Service, ought in their legal Course to be returned, summoned, and to serve; it is enacted, That no Person interested in such Estate as will qualify him to serve on Juries, of the yearly Value of 150*l.* or of greater Value, shall be returned to serve upon any Jury, at any Sessions of the Peace for any Part of the County of *York*, upon the Penalty of 20*l.* to be forfeited by any Sheriff, or other Officer making such Return and Summons, to be recovered for the Use of any Person that will sue for the same in any of the Courts of Record at *Westminster*, by Action of Debt, &c. *Stat. 1 Anne, St. 2. c. 13. §. 3.* And if any such Person shall serve as a Juror at any of the Sessions for any of the Ridings within the County of *York*, or Adjournments for any Part of the said Ridings, he shall not be thereby exempted from serving at the Assises for the County of *York*. *Stat. 10 Anne, c. 14. §. 6.*

Of returning a Panel into Court,
the Number of Jurors to be re-
turned, and how many ought to
be sworn to try the Issue.

BY the Statute 42 *E. 3. c. 11.* reciting No In-
that divers Mischiefs had happen-quest to
ed because that the Panels of Inquests, be taken
which had been taken before Justices by at *Nisi*
Writ of *Scire facias*, and other Writs, *Prius* till
had not been returned before the Sessi-the Names
ons of the Justices at the *Nisi Prius* and of the Ju-
otherwise, so that the Parties could not rors be re-
have Knowledge of the Names of the turned.
Persons which should pass in the Inquest;
whereby divers of the People had been
disherited and oppressed; it was ordain-
ed, that no Inquest, but Assises and De-
liverance of Gaols, should be taken by
Writ of *Nisi Prius* at the Suit of Great
or Small, before the Names of all of
them that shall pass in the Inquest, be
returned in the Court.

The Statute of 6 *H. 6. c. 2.* provides
also for Assises. 3 *Inst.* 175.

The Statute of 42 *Ed. 3.* extends as
well to Writs of *Nisi Prius* in criminal
Cases, as in civil Cases; and to Jurors
returned upon a *Tales*, as well as to those
returned upon the principal Panel. 2 *Harek.*
P. C. 410.

When the
Prisoner is
intitled to
a Copy of
the Panel.

But in Trials before the Justices of Gaol-Delivery, the Prisoner has no Right to a Copy of the Panel before the Time of his Trial; except only in Cases within the Statute 7 & 8 W. 3. c. 3. whereby it is enacted, That every Person indicted and to be tried for High Treason or Misprision thereof (except it be for counterfeiting the Coin, &c.) shall have a Copy of the Panel of the Jurors who are to try him, duly returned by the Sheriff, and delivered unto him two Days at least before he shall be tried.

It has been adjudged to be sufficient within the Intent of this Act, to deliver to the Prisoner a Copy of a Panel arrayed by the Sheriff before it is returned into Court, if the very same Panel be afterwards returned. 2 Hawk. P. C. 410.

What
Number
to be re-
turned.

Although by the Words of the *Venire facias* the Sheriff is only to return twelve, yet by the antient Course he was obliged to return twenty-four, for the Expedition of Justice; for if only twelve were to have been returned, no Man would have had a full Jury appear or be sworn in respect of Challenges without a Tales, which would be a great Delay of Trials. 2 H. 7. 8. Bro. Return de Briefs, pl. 84. 1 Inst. 155. a. Jenk. 172. pl. 38.

At Common Law in civil Cases the Sheriff might have returned above twenty-four if he had pleased; and therefore by the Statute of *Westminster* 2. c. 38. reciting, That whereas the Sheriffs were used

used to summon an unreasonable Multitude of Jurors to the Grievance of the People, it was ordained, that from thenceforth in one Assise no more should be returned than twenty-four. *Godb.* 370. 1 *Kel.* 310. But this Statute extended not to Jurors returned for Trial of criminal Persons. *Kel.* 16.

In Arrest of Judgment Exception was taken that the Sheriff had returned a Panel of twelve only; and that held well enough, for the Statute says, the Sheriff shall return no more than twenty four, and does not say, he shall not return less; and before that Statute the Number was indefinite and uncertain. 2 *Show.* 309. *pl.* 317.

Though the Sheriff returned a less Number than twenty-four, if a sufficient Number appeared and tried the Issue, it was aided by the Statutes of Jeofail as a Misreturn. 5 *Co.* 36, 37. *a.* *Cro. Eliz.* 587. *Cro. Car.* 223. 1 *Jones* 245.

In the *Venire facias* there were twenty-five returned, and at the *Nisi Prius* twelve were sworn, whereof the twenty-fifth Person was one. It was held, that this was a Mistrial, and not aided by the Statutes of Jeofail; but it would have been otherwise if the thirteenth Person had not been sworn. *Cro. Jac.* 647.

Now by the Statute 3 *Geo.* 2. c. 25. §. 8. the Number of Jurors to be returned for Trials of Issues before Justices of Assise or *Nisi Prius* in England, shall not be less than forty-eight nor more than

than seventy-two, without the Direction of the Judges appointed to go the Circuit, or one of them. §. 9. In *Wales* at the Grand Sessions, not to be less than ten, nor more than fifteen, out of every Hundred, without the Direction of the Judge of the Grand Sessions by Rule of Court. §. 10. In the Counties Palatine not to be less than forty-eight, nor more than seventy-two. See folio 53, 54, 55, these Clauses more at large.

How many ought to be sworn.

A Petty Jury must consist of twelve, and can be neither more nor less; but it is said, that particular Inquests may consist of a greater or a lesser Number.

If thirteen Jurors are by Mistake sworn, the Swearing the last of the thirteen is void, and the other twelve shall serve. 2 *Hale's H. P. C.* 296.

If only eleven are sworn by Mistake, no Verdict can be taken of the eleven, and if it be, it is Error, and so a Presentment. But if twelve be returned sworn, no Averment lies that one was unsworn. 1 *Hale's H. P. C.* 296.

An Issue in Debt in an inferior Court in *Cornwall* was tried only by six Jurors, and upon a Writ of Error brought it was insisted, that the Trial was returned to be made *secundum Consuetudinem Curiae a Tempore*, &c. and so no Error. But all the Court held the Custom void, and against the Common Law; and *Jones* said, that though in some Parts of *Wales* such Trials are by six only, that is by reason of the Statute 34 *H. 8.* which appoints

points that Trials may be by six only, where the Custom has been so; which proves that when they were united to *England*, and to be governed by the Laws here, such Trials could not be, unless provided for by Parliament; and so the Judgment was reversed. *Trin. 8 Car. 1. B. R. Tredymmock versus Perryman, Cro. Car. 259. 1 Sid. 233. 3 Keb. 326.*

In an Attaint, the Trial must be by twenty-four Jurors; unless the Issue be upon a Matter out of the Attaint, as upon a Plea of Non-Tenure; and then the Trial may be by twelve Jurors. *21 E. 3. 10. b.*

In a Writ of Right the Trial is by sixteen, viz. by the four Knights and twelve others. *2 Roll. Abr. 674. pl. 4, 5, 6, 7. Dal. 68, 69. Moor 67. pl. 181.*

But a Judgment in an inferior Court was reversed upon a Writ of Error, because, being by Default, the Inquiry of Damages was only by two Jurors; and though a Custom was alledged to warrant it, yet it was resolved that there could not be less than twelve; though the Writ was to inquire *by the Oath of good and lawful Men*, not saying *twelve*, as in a *Venire facias*. *1 Vent. 113.*

Of the Trial's going off for Default of Jurors, the Parties, or Want of Witnesses.

Of the Return of the *Venire*.

IF the *Venire facias* is awarded, and the Parties do not proceed to Trial the next Assises, or the next Term where the Issue is triable in *Middlesex* or *London*, the Process is to be continued from Term to Term by entering that the Sheriff did not return the Writ, and awarding every Time a new *Venire facias*, 'till the *Distringas* or *Habeas Corpora* is awarded. But if the *Distringas* or *Habeas Corpora* was awarded and returned, and a full Jury did not appear, so that the Trial was put off, the Method was to enter the Names of those that did appear, and that the others did not come, therefore the Jury was respited for Default of Jurors; and thereupon an *Alias Distringas* or *Habeas Corpora* was awarded. *G. Hist. C. B. 60.*

Venire facias de novo.

By the Statute 7 & 8 W. 3. c. 32. §. 1. it is enacted, that if any Plaintiff or Demandant in any Cause depending in any of the Courts at *Westminster*, which shall be at Issue, shall sue forth or bring to any Sheriff any Writ of *Venire facias*, upon which any Writ of *Habeas Corpora* or *Distringas* with a *Nisi Prius* shall issue, in order to the Trial of such Issue at the Assises, and that such Plaintiff or Demandant shall not proceed to the Trial

of the said Issue at the said first Assises after the Teste of every such Writ of *Habeas Corpora* or *Distringas* with a *Nisi Prius*, then and in all such Cases (other than where Views of Jurors shall be directed) the Plaintiff or Demandant whensoever he shall think fit to try the said Issue at any other Assises shall sue forth and prosecute a new Writ of *Venire facias* directed to the Sheriff; which Writ being duly returned and filed, a Writ of *Habeas Corpora* or *Distringas*, with a *Nisi Prius*, shall issue thereupon, upon which the Plaintiff or Demandant may proceed to Trial as if no former Writ of *Venire facias* had been prosecuted or filed in that Cause, and so *toties quoties* as the Case shall require.

In an Information for Extortion, an If-Trial not sue was joined, and the Day the Jury to be put was returned, the King sent a Writing off tho' under his Sign Manual to the Clerk of the Crown to enter a Cesser of Prosecution. The Attorney General affirmed, the King might stay Proceedings, yet the Court proceeded to swear the Jury, and said they were not to delay for the Great or Little Seal; whereupon the Attorney General entered a *Noli Prosequi*. *Trin.* 21 Car. 2. B. R. *Rex versus Benson*, 1 Vent. 33.

The Day before a Trial was to be at Attorney Bar, the Plaintiff moved to put it off because he wanted a Witness to prove a Deed. The Court denying the Motion, the Attorney the next Day refused to bring in the Writ, it being a Contrivance to committed for putting off a Trial, by refusing to bring in the Writ.

Of awarding a Tales.

to prevent a Nonsuit. Whereupon the Court ordered the Roll to be brought in, that they might take Notice there was such a Writ; and that being done, the Attorney was committed; as was formerly done by *Hale, c. 9. Mich. 6 W. & M. B. R. Jones against The Earl of Bath, 4 Mod. 361.*

Trial put
off on Ac-
count of
the Ab-
sence of a
Witness.

The Court will put off a Trial upon the Defendant's Application, on Affidavit that one of his material Witnesses is gone beyond Sea, or far in the Country; but then the Defendant himself must positively swear that the Witness is a material Witness, and swear when he believes the Witness will return; and if it appears that the Witness was in the Way after Notice of Trial was given, the Court will not put off the Trial, because it was the Defendant's own Fault that he did not *subpoena* the Witness in Time.

Of Awarding a Tales.

Tales at
Common
Law.

IF upon the Return of the *Habeas Cor-pora* or *Distringas* there was not a full Jury, whether it was by Default or Death of the Persons returned, or by reason of Challenges, the Deficiency was supplied at the Common Law by Writ of *Decem* or *octo Tales* (according to the Number wanting) whereby the Sheriff was commanded to add, *ten or eight* such *Men*, that is to say, Men duly qualified to serve on the Jury, and indifferent be-

tween

tween the Parties, and to have them in Court at a future Day to try the Issue; but this occasioning great Delay to the Parties, a *Tales de Circumstantibus* was *Tales de* given by the Statute 35 H. 8. c. 6. 6. 6. *Circum-* whereby, for the more speedy Trial of *stantibus* Issues, it was enacted, That in every by Statute.

Writ of *Habeas Corpora* or *Distingas*, with a *Nisi Prius*, where a full Jury shall not appear before the Justices of Assise or *Nisi Prius*, or else after Appearance of a full Jury, by Challenge of any of the Parties, the Jury is like to remain untaken for Default of Jurors, the same Justices, upon Request made by the Plaintiff or Defendant, shall have Authority to command the Sheriff, or other Minister or Ministers, to whom the making of the same Return shall appertain, to name and appoint, as often as Need shall require, so many of such other able Persons of the said County, then *present* at the said Assises or *Nisi Prius*, as shall make up a full Jury, which Persons so to be named and impanelled by such Sheriff, or other Minister or Ministers, shall be added to the former Panel, and their Names annexed to the same. By the Statute 4 & 5 P. & M. c. 7. this Act is extended to Juries impanelled to try an Issue joined between the King and the Party, and between Parties where the one prosecutes as well for the King as himself. By the Statute 5 Eliz. c. 25. this Act is extended to *Wales* and the Counties Palatine of *Chester*, *Lancaster* and *Durham*. And by the Statute 14 Eliz.

Of Awarding a Tales.

c. 9. §. 1. where the Plaintiff or Demandant may have, upon his Request to the Justices of the *Nisi Prius* in *England*, or to the Justices of *Oyer*, or of Assises of the twelve Shires of *Wales*, and the Counties Palatine of *Chester*, *Lancaster*, and *Durham*, a *Tales de Circumstantibus*, in all such Cases the Tenants, Actors, Avowants, and Defendants (if the Plaintiffs or Demandants shall forbear to pray the same) may, upon their Request, have by the same Justices the *Tales* granted to them, in the like Manner as the Plaintiff or Demandant may. §. 2. In all popular Actions in the Queen's Courts of Record upon penal Laws, wherein any Person shall sue as well for the Queen as himself, the Defendants shall be admitted to pray a *Tales de Circumstantibus*.

Who may be returned upon the *Tales* in *England* and *Wales*. It shall be lawful to return any Person upon the *Tales* in *England*, who shall have within the County 5 *l.* by the Year, and not otherwise. And to return any Person upon the *Tales* in *Wales*, who shall have within the County 3 *l.* by the Year. Stat. 4 *W. & M. c. 24. §. 18, 19.*

No Fee on Account of a *Tales* returned. No Fee shall be taken by any Sheriff, Clerk of Assises, or other Person, upon Account of any *Tales* returned, upon Pain of 10 *l.* one Moiety to the Prosecutors, and the other to their Majesties, to be recovered by Action of Debt, &c. Same Statute 4 *W. & M. c. 24. §. 20.*

Sheriff to return on *Tales* Freeholders, &c. returned on some other Panel. In every Writ of *Habeas Corpora* or *Distringas* with a *Nisi Prius*, where a

full Jury shall not appear, or where the Jury is like to remain untaken for Default of Jurors, the Sheriff shall upon the awarding the *Tales*, return Freeholders or Copyholders of the County, who shall be returned upon some other Panel to serve at the same Assises, and not others if so many of the other Panels be present; and either of the Parties shall have his Challenge; and in case any such Freeholder or Copyholder, as the Sheriff shall return upon the *Tales*, being present, shall be called and not appear, or shall wilfully withdraw himself, the Judge of Assise shall set a Fine upon such Person. *Stat. 7 W. 3. c. 32. §. 3.*

Since the Statute 3 Geo. 2. c. 25. by which the Sheriff cannot return less than forty-eight Jurors, the Use of a *Tales* seems to be taken away, except in criminal Cases, (that Statute herein only extending to civil Causes) and where a special Jury is returned; it being held by *Raymond* Chief Justice, in delivering the Opinion of the Court in the Case of the *King and Franklyn*, 5 Geo. 2. that the Statute of 3 Geo. 2. c. 25. does not exclude a *Tales de Circumstantibus*, but that such *Tales* may be still granted upon Special Juries.

A *Tales* at the Common Law is called only a *Tales*, a *Tales* by the Statute is called a *Tales de Circumstantibus*; the last of which cannot be granted at a Trial at Bar, which is a Trial at Common Law; for there it must be only a *Tales* by Writ annexed to the *Venire facias*

cias. Godb. 203, 204. pl. 291. 2 Sid. 77. Cumb. 251.

At the Time of granting a *Tales*, four Things are to be considered. 1st, It is to be upon Default of so many of the principal Panel, that there cannot be a full Inquest. 2dly, That the principal Panel be standing at the Time; for *Tales* is a Word similitudinary; and therefore, if the Array be quashed, or all the Polls challenged and drawn out, no *Tales* shall be awarded, because now there are no *Quales*; but a new *Venire facias* shall be awarded; but if at the Time of granting the *Tales*, the principal Panel is standing, and afterwards is quashed, yet the *Tales* shall stand; for if there were *Quales* at the Time it is sufficient, as appears in 34 H. 6. Tit. *Inquest*, 30. 3dly, He that is merely a Defendant cannot pray a *Tales* till the Plaintiff has made a Default. 4thly, In some Cases *Tales* shall be granted after a full Jury appears and is sworn; as if a Jury is charged, and afterwards and before Verdict given in Court, one dies, a *Tales* shall be awarded and not a new *Venire facias*. And so is 12 H. 4. 10. a. So if any Jurors impanelled die before Appearance, and this appears by the Sheriff's Return, a *Tales* may be awarded if need be. 10 Co. 104. b.

On a Deficiency, principal Panel but one were challenged of what off, so that one only was sworn; the Number a *Tales* shall be awarded, and whether the Trial may be by the *Tales* only without any of the principal Panel.

Plaintiff

Plaintiff prayed a *Tales de Circumstantibus*, and had it, tho' the Statute 35 H. 8. c. 6. 6. 7. speaks in the Plural Number, viz. they shall proceed with *those* before impanelled, and *those* added. And if eleven of the first Panel appear, one more may be added *de Circumstantibus*. And *Brown* held, that if two of the principal Panel only appear, and at the Prayer of the Plaintiff, a *Tales* of twelve *De Circumstantibus* is returned, and then the two principal are challenged out; the Trial shall be by the twelve *Tales* only. But the Reporter makes a *Quaere* if it may be so by the Statute; but says, that at Common Law the *Tales* should pass in Trial without any of the principal Panel. *Dyer* 245. pl. 64. 10 Co. 103. b. *Cro. Jac.* 316. pl. 19. 10 Co. 102. *Godb.* 203, 204. p. 291.

A *Tales* may be granted as well on the Application of the Defendant as of the Plaintiff. If a full Jury do not appear, and the Plaintiff prays a *Distingas* without praying a *Tales*, the Court ought to grant it at the Prayer of the Defendant. *Cro. Car.* 484. 10 Co. 104. *Dyer* 359.

But it seems the Defendant cannot regularly pray a *Tales* till there has been a Default in the Plaintiff. 1 *Brownl.* 35. 2 *Hawk. P. C.* 408.

If the Defendant sues out a *Nisi Prius* by *Proviso*, the Plaintiff may pray a *Tales*.

Holt, Chief Justice: The Plaintiff is not bound to pray a *Tales*, but only to bring in the Record for Trial; if he does not

Tales may

be award-

ed as well

on the

Prayer of

the Defen-

dant as of

the Plain-

tiff.

But not

till Default

in Plaintiff.

not pray a *Tales* the Defendant may.
12 *Mod.* 204.

In an Appeal the Appellant may pray a *Tales* in the same Manner as a Plaintiff in other Actions, as also may the Appellee, if the Appellant neglects to pray one the same Term. 2 *Hawk. P. C.* 408.

What
Number
may be
granted
on a *Ta-*
les.

In capital Cases the *Tales* may be granted for a larger Number than the first Process; as for forty or sixty or any other even Number, in order to prevent Delays from peremptory Challenges; and in this Respect, a *Tales* in capital Cases differs from a *Tales* in any other Case; it being a settled Rule, that in all other Cases the *Tales* must be for a less Number than the first Process. 1 *Bulst.* 121. *Dyer* 213. pl. 41. But a *Tales de Circumstantibus* may be of any uncertain Number. 10 *Co.* 105. a. 2 *Hal. H. P. C.* 266. 2 *Hawk. P. C.* 408.

What on
a subse-
quent *Ta-*
les.

Every subsequent *Tales*, as well in capital as in civil Cases, must be for a less Number than the former, except the former be quashed, in which Case the next may be for the same Number. 10 *Co.* 105. a. *Kelw.* 176. 2 *Hawk. P. C.* 408. 2 *Hal. H. P. C.* 266. 5 *H. 5.* 1. pl. 2. *Bro. Process* 46. 2 *Roll. Abr.* 672. (S. C.)

Whether
quashing
the Array
of the prin-
cipal Pa-
nel quashes
the Array
of the *Tales*.
34 *H. 6.*
20.

The Quashing the Array of the principal Panel doth not quash that of the *Tales*, but the Inquest shall be taken by those returned on the *Tales*, if there be a sufficient Number, otherwise more shall be added to them by a new *Tales*; but if all the Persons returned on the *Habeas Corpus*

Corpora, be challenged and drawn, there shall not be a *Tales* awarded, but a new *Venire*; for the Word *Tales* refers to some others, to whom the Persons returned are to be like; also if the first *Habeas Corpora* be quashed, the second with a *Tales* cannot but be quashed with it, and the Party must go on as if the *Venire* had only been returned; for, where a Process is quashed, all that follows and depends upon it falls with it. 2 Hawk. P. C. 409. 2 Roll. Abr. 671. (P. c.) 1 Dal. 11. Dyer 78. 10 Co. 104. Dyer 245. pl. 64. At Wickham Assises in Bucks 1684. only one Juror appeared, who was challenged; but before he was set aside, the Court granted a *Tales*. *Trials per Pais* 63, (72).

A *Tales* is not grantable on the Return *Tales* not of the *Venire facias*, but only on the grantable, Return of the *Habeas Corpora* or *Distingas*; because it cannot be known till turn of such Return, but a full Jury may appear. *Habeas Corpora* or *Distingas*. 34 H. 6. 21. Cro. Eliz. 502. Moor 528. pl. 698. Noy 64.

On an Indictment for not repairing a Way, a *Venire facias* was awarded returnable at the next Quarter-Sessions; upon the Return of the *Venire*, only Part of the Jury appeared, and thereupon a *Tales de Circumstantibus* was awarded, who with the principal Panel tried the Traverse, and found the Defendant guilty. Holt, Chief Justice, here is a Mistrial, for a *Tales de Circumstantibus* cannot be granted upon the *Venire facias*. And for this and other Exceptions the Judgment

ment was reversed. 2 *L. Raym.* 1170.
Vide Bro. Oſto Tales, 18. *Ven. ſa.* 18.
 15 *H.* 7. 9.

What the first Proceſs againſt the *Tales*. A *Diſtringas* or *Habeas Corpora*, with a Command to add ſo many more to thoſe ſummoned on the *Venire*, is the first Proceſs againſt the *Tales*.

If a Juror be withdrawn after a Trial commenced, whereon a *Tales de Circumſtantibus* was awarded, and after a new *Habeas Corpora* be taken out with a *Tales*, it ſhall appoint the *Tales* to be added to the Jurors firſt returned, and alſo to thoſe returned on the *Tales de Circumſtantibus*. Be cauſe the Court will take judicial Notice of what is done at *Niſi Prius*, being entered on Record. 2 *Hawk. P. C.* 409. *Cro. Jac.* 677.

Tales de Circumſtantibus may be granted in capital Caſes. How prayed for the King. The Statutes which authoriſe Juſtices of *Niſi Prius* to award a *Tales de Circumſtantibus*, extend as well to all capital Caſes as others; but ſuch a *Tales* cannot be prayed for the King upon an Indictment, or criminal Information, without a Warrant from the Attorney General, or an expreſs Assignment from the Court, before which the Inqueſt is taken. 1 *Lev.* 223. *T. Raym.* 367. 1 *Keb.* 490. 6 *Mod.* 246. 2 *Hawk. P. C.* 409.

Whether a *Tales* be grantable by Juſtices of Oyer and Gaol-Delivery. It ſeems not to be clear, that a *Tales* is grantable by Juſtices of Oyer, &c. or of Gaol-Delivery; but if a Trial be put off before Juſtices of Gaol-Delivery for Want of a full Jury, they may without Doubt, order a larger Panel, whereon the former Jurors ſhould be returned in the ſame Order as before, and called to be ſworn

sworn as they stand, without any more Regard to those, who were sworn before, than to the others; and the like Method is to be observed as to a Jury returned with a *Tales*. 2 *Hawk. P. C.* 409. *Kelw.* 170. *pl.* 10. *Plowd.* 100. *Tel.* 23. *Jenk.* 340. Before Justices of Gaol-Delivery, this Warning of *Tales* is not of much Use, because there is no particular Precept to the Sheriff to return either Jury or *Tales*, but the general Precept before the Sessions, and the Award or Command of the Court upon the Plea of the Prisoner. 2 *Hal. H. P. C.* 266.

A Custom in an inferior Court to try A Custom by a *Tales de Circumstantibus* is void, in an inferior Court as it breaks down that important Rule, that Trials must be by *Pares*, and admits an unlimited extravagant Latitude a *Tales de* of gleanng together any Set of Men for *Circum-* Jurors, however profligate and unfit for *stantibus*, the Office, and intirely deprives the Par-void. ties of their Challenges. *Styl.* 16. *Mich.* 6 *Geo.* 2. *B. R.* *Bell* versus *Knight*. *Vide Gibb.* 274.

The Sheriff upon a *Tales de Circumstantibus* may impanel a Priest or Deacon, if he hath sufficient Freehold of Lay-Fee; but not an Infant, or one of the Age of eighty Years; he may impanel Coroners, capital Ministers of any Corporations, Foresters, Men blind, mute, (if they have their Understanding, but not deaf Men) excommunicated Persons, but not outlawed or attainted, nor Aliens, nor Clerks attainted, nor Persons attainted of false Verdicts; the Coroners may put
F the

the Sheriff upon the *Tales*. *Trials per Pais* 64. (71.)

The *Tales* ought to be of the same Quality as the Principals are; and therefore if the first are *per Medietatem Linguae* of *English* and Aliens, the *Tales* ought to be the same. 10 Co. 105. a.

Of Challenges.

Challenge,
what.

THE Word *Challenge* hath various Significations, but in this Place it denotes an Exception to the Persons returned to try a Cause, or to some of them, on account either of Partiality, or some Default in the Person who returned them, or in respect of Partiality or some Default in the Persons returned.

What
Kinds.

Challenges are of two Sorts, either principal Challenges, or Challenges to the Favour; and these may be taken either to the Array of the principal Panel, or to the Array of the *Tales*, or to the Polls. 1 *Inst.* 155. b. 156. a.

Principal
Challenge.

A principal Challenge is so called, because if it be found true, it standeth sufficient of itself to quash the Array or set aside the Juror who is challenged, without leaving any thing to the Conscience or Direction of the Triers. 1 *Inst.* 156. b.

To the
Favour.

Challenges to the Favour, are where either Party not being able to take a principal Challenge, shews Causes of Favour, which must be left to the Conscience and Discretion of the Triers upon hearing Evidence,

Evidence to find him favourable or not:
1 Inst. 157. b.

Challenges to the Array.

THE Array of the Panel signifies To the the Order or Ranking of the Jurors Array. Names in a small Piece, Pane, or Panel of Parchment which the Sheriff returns annexed to the Writ of *Venire facias*; and a Challenge to the Array, is an Exception to all the Persons so arrayed, impanelled or returned, in respect of some Unindifferency or Default in the Sheriff, Coroner, or other Officer who made the Return; and not in respect of the Persons returned; and this Kind of Challenge, as I said before, is of two Sorts, either a principal Challenge, or to the Favour, the like as to the Polls or particular Jurors; for the Judges thought there could be no better Rule to determine what should be a proper Challenge to the Officer, than what was a proper Challenge to each Juror's Partiality; for it could not be presumed that they had an impartial Jury, unless the Officer who impanelled and returned them was absolutely indifferent.

There are many Causes of principal Challenge to the Array.

In respect of Partiality.

As if the Sheriff or other Officer be of Kindred or Affinity to the Plaintiff or

Principal Challenges to the Array.

Kindred or Affinity.

Challenges to the Array.

Defendant, if the Affinity continue. 1 *Inst.* 156. a.

Jurors
returned
at the De-
nomina-
tion of
either
Party.

If any one or more of the Jury be returned at the Denomination of either Party, Plaintiff or Defendant. 1 *Inst.* 156. a.

Action be-
tween the
Sheriff
and either
Party.

If the Plaintiff or Defendant have an Action of Battery, or any Action that implies Malice against the Sheriff, or the Sheriff against either Party; so if either Plaintiff or Defendant has an Action of Debt against the Sheriff, but not if the Sheriff have an Action of Debt against the Plaintiff or Defendant; for the Sheriff thereby is not under the Party's Influence, but the Party under his. 1 *Inst.* 156. a.

Sheriff ha-
ving Land
on the
same Title.

If the Sheriff have Parcel of the Land depending upon the same Title. 1 *Inst.* 156. a.

Sheriff
Tenant or
under the
Distress of
either
Party.

If the Sheriff or his Bailiff who returned the Jury be Tenant, or under the Distress of the Plaintiff or Defendant. 1 *Inst.* 156. a.

Or of his
Counsel,
&c.

If the Sheriff or his Bailiff be either of * Counsel, Attorney, Officer in Fee, or of Robes, or Servant to either Party, Gossip, or Arbitrator in the same Matter, and has treated thereof. 1 *Inst.* 156. a.

* But by *Finch of Law* 402. these are Challenges to the Favour only.

By

By Default of the Sheriff

As if the Array of a Panel be returned by the Bailiff of a Franchise, and the Sheriff returns it as of himself; because the Party should lose his Challenge for a Default in the Bailiff, the Return on Record being in the Sheriff's Name. But if the Sheriff return a Juror within a Liberty it is good; no one being injured but the Lord of the Franchise, who is driven to his Remedy against him. *1 Inst. 156. a.*

The Sheriff's returning a Jury as impanelled by himself, when in Fact impanell'd by the Bailiff of a Franchise.

If a Peer of the Realm, or Lord of Parliament, Spiritual or Temporal be a Party, though joined with others (as if he be one of several Plaintiffs or Defendants) if no Knight be returned on the Jury, the Array may be challenged and shall be quashed; but if a Knight be returned, though he doth not appear, it is sufficient, and the Jury may be taken of the Residue.

No Knight returned of the Jury.

In an Attaint there ought to be a Knight returned of the Jury. *1 Inst. 156. a. 2 Roll. Abr. 637. Viner's Abr. Trial 225. (G. c.) Per Holt, Chief Justice, the Reason was for the Security of the Commons; for a Knight was presumed to be a Man of Courage, and not afraid to look a Peer in the Face. Mich. 5 Ann. The Queen against Soleby 11 Mod. 102. In Ejectment in Ireland, on the Demise of Lady Conway, at the Trial the Defendant challenged the Array, for that the Lessor of the Plaintiff being a Countess there, and the Ejectment was to try her Title, and that she bore the Costs*

Challenges to the Array.

of the Suit, and prosecuted the same, and that the Sheriff had made that Array, without returning any Knight. To this the Plaintiff demurred, and upon a Writ of Error in the King's Bench here, the Court held, that the Defendant might take Advantage of a Knight's not being returned as well as the Plaintiff, notwithstanding the Opinion in *Dier*; and that it might be in Ejectment as well as in any other Action, the Lessor being the real, and the other only the nominal Plaintiff; and it appears upon Record to be the Lady *Conway's* Demise. *Hill.* 36, 37 *Car.* 2. *Alleway* versus *Roxden.* 2 *Show.* 422. *Skin.* 229. But it has been since held, that the returning no Knight where a Peer is Lessor of the Plaintiff, is no Cause of Challenge, because he does not appear to be Party to the Record. 1719. *Dom. Procer.* *Holborn* versus *Bannington,* *Mich.* 9 *Geo.* 2. *Grimston* Lessee of *Lord Gower* against *Gardiner.* In an Information for a Riot against several, at the Trial a Challenge was offered on the Behalf of the Lord *Grey's* being one of the Defendants, who was a Peer, that no Knights were returned on the Panel, and was received by *Saunders,* Chief Justice; for he was of Opinion that to have Knights of the Jury was the Privilege of a Peer in criminal as well as civil Cases. *Hill.* 34 & 35 *Car.* 2. *Rex* versus *Pilkington,* 2 *Show.* 262.

If a Peer be concerned in the Event of a Cause, as if he have the Reversion upon an Estate for Life, and an Action is brought

brought against the Tenant for Life, it is no Cause of Challenge that a Knight is not returned of the Jury. *Skin.* 229.

If there be no other Knights in the County, a Serjeant at Law that is a Knight may be returned, and his Privilege shall not excuse him. *1 Mod.* 226. *2 Mod.* 182.

A Challenge to the Array *quia nullus Miles in eodem Panello existit retornat*, is not good; but it must be averred, that such a one and such a one returned upon the Panel are not Knights, and then it may be tried. *Skin.* 229. *2 Show.* 422.

If the Bailiff of a Franchise return any Array re- out of his Franchise; or if an Array be turned by returned by one who has no Franchise, it one who may be challenged, and shall be quashed. *1 Inst.* 156. was in Authority.

He who challenges the Array for Fa- Challenge your, must shew in certain the Name of to the Ar- him that made it, and in whose Time ray for and all in Certainty; this Kind of Chal- Favour. lenge must be left to the Conscience and Discretion of the Triers.

Affinity between the Son of the She- Affinity. riff, or the Daughter of either Plaintiff or Defendant, or between the Son of the Plaintiff or Defendant and the Daughter of the Sheriff, is only a Challenge to the Favour; but if the Sheriff marry the Daughter of either Plaintiff or Defendant, or the Plaintiff or Defendant marry the Son or Daughter of the Sheriff, it is a principal Challenge. *1 Inst.* 156. a.

If the Plainriff or Defendant be Tenant Either Par- to the Sheriff, it is no Cause of princi- ty Tenant pal Challenge, but to the Favour only; to the for Sheriff.

Challenges to the Array.

for the Lord is in no Danger of his Tenant; but if the Sheriff is Tenant either to the Plaintiff or Defendant, it is a principal Cause of Challenge; as I have said before. *1 Inst. 156. a.*

Sheriff
and Plain-
tiff Fel-
low-Ser-
vants.

That the Plaintiff and the Sheriff were of the Liveries (or Fellow-Servants) to a Nobleman, was held to be no principal, but to the Favour only. *Dyer 367. pl. 40.*

Lessor of
the Plain-
tiff of Kin
to the
Sheriff.

It has been doubted whether in an Ejectment it be a principal Challenge that the Lessor of the Plaintiff is of Kin to the Sheriff, in such a Manner as would make it a principal Challenge, in case he were either Plaintiff or Defendant; some have held it to be a principal Challenge, because it is but a fictitious Action, and the Plaintiff a fictitious Person, the Lessor being only concerned in Interest, and the Courts taking Notice of the Lessor as the real Plaintiff, by ordering him in certain Cases to pay Costs, &c. (And it is said, that where a Defendant justifies as Servant to *J. S.* and that the Land is the Freehold of *J. S.* it is a principal Challenge, that a Juror is within the Distress of *J. S.* for that the Title is to be tried. *Hutt. 25.*) But the better Opinion is, that it is no principal Challenge, that the Lessor not being a Party to the Record, the Judge, *ex Officio*, is not obliged to take Notice of him; and to do it in this Case would tend to Delay, which the Courts always avoid. *1 Roll. Rep. 328. Harebotle versus Placock. Cro. Jac. 21. Eyre versus Banister.*
Moor

Moor 894. And where the Lessor of the Plaintiff was a Peer, and no Knight was returned in the House of Lords, it was held to be no Cause of Challenge because he did not appear to be Party to the Record 1719. *Holborn* versus *Bannington*, *Mich.* 9 *Geo.* 2. *Grimston* Lessee of *Lord Gower* versus *Gardiner*. *Et vide Skinn.* 229. S. P. *vide antea* fo. 102.

The Defendant would have challenged Panel re- the Array, *Ore tenus*, because it was re- turned by the Sheriff two Days after he had received his Writ of Discharge; but it was held, that he could not challenge for that Cause, because it would be a direct Averment against the Record; for it is returned by him as Sheriff and accepted; but by the Advice of the Court the Defendant made his Challenge to the Array because it was favourably made and returned in Favour of the Party, &c. and Issue being joined thereon, and all this Matter given in Evidence, the Court directed the Triers that it was not duly made and returned, for it was without Warrant; whereupon the Array was quashed. *Hill.* 37 *Eliz.* B. R. *Hore* versus *Broom*, *Cro. Eliz.* 369.

A Challenge was taken to the Array, Challenge because the Sheriff who made the Re- for that turn, had continued in his Office for more the She- than three Months, and had not taken riff's Of- the Oaths and subscribed the Declaration fice was required by the Statute 25 *Car.* 2. c. 2. void before he return- made for preventing Dangers which may ed the Ju- happen from Popish Recusants; and so ry, not ha- his Office by that Statute was void to all ving taken

Challenges to the Array.

Intents and Purposes before he made the Return of the Jury. But the Court disallowed the Challenge, for he must be taken here as Sheriff *de facto*, and if such a Challenge should be allowed, no Trial could be had, but must be put off, unless the Party was ready to shew that the Sheriff had taken the Test. 2 Vent. 58.

Plaintiff The Plaintiff for Expedition of Trial
Servant to the Sheriff surmised, that he was Servant to the Sheriff of *Cornwall*, where the Action was brought and triable, and prayed a *Venire* to the Coroners; the Defendant not denying this, Process was awarded to the Coroners accordingly; after Trial and Verdict for the Plaintiff, it was moved, that the Process was misawarded, and a Mistrial, for that the Process ought not to be awarded to the Coroners, but where the Challenge is principal; and here to say that he was Servant to the Sheriff is no principal Challenge, as 21 E. 4. 67. but only to the Favour. But the Court held, that forasmuch as if the Sheriff had returned this Panel it had been a good Cause to quash the Array for Favour, the Plaintiff to avoid that Delay might well shew it, and have Process to the Coroners, and so much the rather this being a judicial Writ and not original, as *Plowd.* 74. *Mich.* 39 & 40 *Eliz.* B. R. *Cro. Eliz.* 581. *Cro. Jac.* 21, 547.

Though one of the Parties challenge the Array, and it is found against him, he may nevertheless challenge the Polls; but neither Party shall take a Challenge

to the Polls which they might have had to the Array. 1 *Inst.* 156. b. 157. b.

If either Party having challenged the Array release his Challenge, and challenge the Polls, he shall shew Cause immediately. 27 *H.* 8. 26. 19 *Aff.* p. 6.

No Challenge can be taken to the Array after a Juror is sworn. *Hob.* 235.

When the Plaintiff sues out a *Venire facias* to the Sheriff, he is not estopped to challenge the Panel for Kindred or other Cause that was before the *Venire*. *Ibid.*

If both Parties challenge the Array it shall be quashed. 8 *H.* 4. 22. 1 *Inst.* 156. a.

Challenges to the Polls.

A Challenge to the Polls is a Challenge to the particular Persons returned, and is of four Kinds, viz. peremptory, principal, for Favour, and for Default of Hundredors. The several Kinds of Challenges to the Polls.

A peremptory Challenge is that, which the Party may take upon his own Dislike without shewing any Cause, and is allowable only in Cases of Treason or Felony in *Favorem Vitae*. 1 *Inst.* 156. b. *Lamb.* 4. c. 14. What a peremptory Challenge is.

By the Common Law he might challenge peremptorily thirty five, being un-Treason or Petit Treason the Prisoner may challenge thirty five peremptorily, in all other capital Cases but twenty.

der the Number of three Juries, four Juries being as many as generally appeared; but now in Cases of Murder or Felony, by the Statute of 22 H. 8. c. 14. he can challenge but twenty; for by that Statute, which is made perpetual by the Statute 32 H. 8. c. 3. it was enacted, that no Person arraigned for any *Petit Treason, Murder or Felony*, should from thenceforth be admitted to any peremptory Challenge above the Number of twenty. And by the Statute 33 H. 8. c. 23. it was enacted, that peremptory Challenges should not from thenceforth be admitted or allowed in any Cases of *High Treason*, nor *Misprision of High Treason*. But by the Statute 1 & 2 P. & M. c. 10. it was enacted, that Trials thereafter to be had, awarded, or made for any *Treason*, should be had and used only according to the due Order and Course of the Common Laws of this Realm, and not otherwise; the Words any *Treason*, including as well *Petit Treason* as *High Treason*, this Act has repealed *Stat. 22 H. 8.* as to *Petit Treason*, and *Stat. 33 H. 8.* as to *High Treason*, and restored the Common Law in both those Cases; but this Statute not mentioning *Misprision of High Treason*, whether the Statute 33 H. 8. is not still in Force in that respect is doubted. 2 *Hale's H. P. C.* 267, 268. 2 *Hawk. P. C.* 413. 1 *Inst.* 156. b.

Q. as to
Misprisi-
on of
High
Treason.

Allowable
in Appeals
as well as
on Indict-
ments.

A Man may challenge peremptorily as well in an Appeal at the Suit of the Party, as in an Indictment at the Suit of the

the King. 1 *Inst.* 156. b. 10 H. 4. 9. a.
1 H. 5. 10. *Fitzh. Chall.* 162. 9 H. 5. 7.
9 E. 4. 27. 2 R. 3. 13. 3 H. 7. 2.
14 H. 7. 7, 19. *Moor* 12, 46. But *St.*
Germain says, that peremptory Challenges shall not be allowed in Appeals because they are at the Suit of the Party. *Dr. & Stud. Dial.* 1. c. 8. And *Bro. Chall.* 211. seems to doubt of it.

If a Man outlawed for Treason or Felony be brought to the Bar, and plead Misnomer or other Plea triable by the Country; in Avoidance of the said Outlawry he shall not challenge peremptorily, for the Treason or Felony is not to be tried by this Issue, for that was determined before by the Outlawry. *Stamf. lib.* 3. c. 7. fo. 158. The like Law if he brings a Writ of Error upon the Outlawry, and assigns Error in Fact; or if he pleads any foreign Plea in Bar or Abatement, which tends not to the Trial of the Treason or Felony, but of some collateral Matter only. 2 *Hale's H. P. C.* 267. 2 *Hawk. P. C.* 411. A Man attainted by Act of Parliament of High Treason, escaped, and being retaken and brought to the Bar, pleaded that he was not the same Person: it was held that he could not challenge peremptorily. 1 *Lev.* 61.

There have been various Determinations touching what should be done with the Prisoner where he challenged peremptorily a greater Number than by Law he challenges peremptorily a greater Number than he ought. What shall be done with the Prisoner when he

he.

Challenges to the Polls.

he was allowed to do, and would not waive such Challenges, but insisted on them; this Matter we shall consider first, with regard to peremptory Challenges at Common Law: Secondly, with regard to peremptory Challenges as limited by the Statute 22 H. 8. c. 14. As to the first, we find the following Cases; If the Prisoner challenges three Inquests, thirty-six Jurors, he shall be put to his Penance, that is, have Judgment of *Paine fort & dure*, A. 3 E. 3. It. Nort. Fitz. Corone 359. The Defendant in an Appeal challenging thirty-six Jurors was put to his Penance. H. 3 H. 7. 2. Bro. Appeal 82. Paine 4. A Man arraigned at *Newgate* having challenged thirty-six Jurors, the Question was what should be done with him, and all the Justices of the one Bench and the other agreed, that he should be hanged, and not put to his Penance; and agreed to observe that Rule upon their Circuit. *Hussey* said, that the Opinions of the Justices in the Time of *Ed. 4.* had been to the contrary. Mich. 3 H. 7. 12. F. Corone 56. Bro. Paine 5. But in the very same Page is the following Case: A Man indicted as Principal, being arraigned, and challenging thirty-six, was adjudged to his Penance, as one who had refused the Law. And *Hussey* said, that in the Time of *Ed. 4.* in the Exchequer Chamber, it was held by all, &c. that he should be put to his Penance. Mich. 3 H. 7. 12. Fitz. Corone 51. Bro. Corone 136. Lord *Hale* says, that the better Opinion of latter Times, as well as of

of former, is, that the Prisoner shall be put to Penance and not attainted. This Judgment of Penance is by Virtue of the Statute of *Westminster* 1. c. 12. whereby it is provided, that notorious Felons, who openly are of evil Name, and will not put themselves upon Inquests of Felonies, that Men shall charge them with before the Justices at the King's Suit, shall have strong and hard Imprisonment, as they which refuse to stand to the Common Law of the Land; but this is not to be understood of such Prisoners as be taken of light Suspicion; and is as follows: The Prisoner is to be carried back to Prison into a lower Room stopped, and being naked all but his Loins, is to be laid on the bare Ground, his Head covered and his Legs extended, and one Arm is to be drawn with a Cord to one Corner of the Room, and the other Arm to another Corner, and one Foot to be drawn to another Corner, and the other Foot to the other Corner of the Room, then as much Weight of Iron and Stone is to be laid upon his Body as he can bear and more; the first Day he is to have three Morsels of Rye or Barley Bread, and no Drink; and the next Day he is to drink as much as he can three Times of such standing Water, not running Water, as is near the Prison, and so one Day Bread, and another Day Water, and this to be his Diet until he be dead. 8 H. 4. 1. 14 E. 4. 8. *Kelw.* 70. By this Judgment the Prisoner only forfeited his Goods but not his Lands. This Statute of *Westminster* 1. c. 12.
dees

does not extend to High Treason, for in that Case if the Prisoner stands mute or challenges peremptorily more than he ought, he shall have Judgment as a Traitor Convict. 1 *Inst.* 391. *a.* *Bro. Paine* 19. *Dier* 205. *p.* 4. *Sav.* 57. There have been Variety of Opinions whether this Statute extends to Appeals. 45 *Aff.* *p.* 50. 8 *H.* 4. 1, 2. 4 *E.* 4. 11. 4 *E.* 4. 7, 8. 3 *H.* 7. 2. say, that the Defendant in an Appeal may be adjudged to *Paine fort & dure*; but 21 *E.* 3. 18. *Keble* in 3 *H.* 7. 2. *Dr. & Stud.* l. 2. c. 41. & *Stamf. P. C.* l. 2. c. 1. *fo.* 150. *a.* are to the contrary; for the Statute speaks of a Charge at the King's Suit. *Ideo quære* as to a Prisoner's challenging peremptorily above the Number of twenty, since the Statute 22 *H.* 8. c. 14. the better Opinion seems to be that he shall not have Judgment of Death, or of *Paine fort & dure*, but shall be over-ruled as to all his peremptory Challenges above the Number of twenty, and put upon his Trial; and that, as Lord *Hale* says, for two Reasons; first, because the Law hath made no Provision to attain the Felon, if he challenges peremptorily above the Number of twenty. Secondly, because the Words of the Statute are, that he be not admitted to challenge above the Number of twenty; so that if he challenges above twenty peremptorily, his Challenges shall only be disallowed. 2 *Hal. H. P. C.* 268, 296, 270. 2 *Hawk. B. C.* 414.

In an Appeal against two, if one Defendant challenges a Juror peremptorily, he shall be drawn against both, if there be but one *Venire facias*, but if there be several *Venire facias*'s, he may be sworn against the other. And yet there may be Covin between the Plaintiff and one of the Defendants to keep the other in Prison. 9 E. 4. 27. Bro. Chall. 84. Five indicted for Murder, and one *Venire facias* awarded against all, and they severed in peremptory Challenges, yet the Jurors who were challenged shall be drawn against all upon the Challenge of one, although that the others challenge him not, but allow him. 1 Ma. Salisbury's Case, *Ploved.* 100. a. 2 Hale's H. P. C. 268. 1 Inst. 156. b.

If the Defendant challenges a Juror for Cause which is tried and found against him, he cannot afterwards challenge that Juror peremptorily. 10 H. 4. 9. a. Fitzb. Chall. 180. If a Man, who is arraigned of Felony upon an Indictment, challenges all the Jurors for Cause, when they come to peruse the Panel, he may release it and challenge peremptorily. 37 H. 6. 8. Bro. Chal. 86. A Man was arraigned of Treason, and eight were sworn, but the Jury remained for Default of Jurors, and at another Day he challenged Part of them who were sworn before peremptorily, and Part for their Freehold, and both Challenges allowed, the one in Favour of Life, and the other for that it might be that they became insufficient since. 32 H. 6. 26. Bro.

Where it one Defendant challenges a Juror peremptorily, he shall be drawn against the other Defendants, if but one *Venire*.

Whether the Prisoner, after he has challenged a Juror for Cause, may challenge him peremptorily.

Challenges to the Polls.

Bro. Chall. 193. *Mes vide* 9 *H.* 5. 7. *Chall. Fitzh.* 72. *Bro.* 50. *al contra.* Appeal of Robbery; the Defendant challenged a Juror for a Cause which was tried against him, and the Jury remained for Default of Jurors; and at another Day he challenged the same Juror peremptorily, and it was allowed. 2 *R.* 3. 15. *Bro.* 194. In Appeal, after the Defendant has challenged a Juror for Cause, and he is tried and found indifferent, and sworn, the Defendant cannot, the same day, challenge him peremptorily, but at another Day, as if the Jury remain for Default, and a *Tales* is awarded, he may challenge him peremptorily, or he may challenge for Cause that arose since the last Day. 14 *H.* 7. 19. *Bro. Chall.* 75. *Appeal* 74. 2 *Hale's H. P. C.* 270.

If upon the first Panel the Prisoner challenges some peremptorily, and the Jury remains for Default of Jurors, whereupon a *Tales* is awarded, upon the Return thereof he shall be allowed to challenge peremptorily only so many as with his first Challenge will amount to make up thirty-five, if the Indictment be for High Treason or Petit Treason, or to twenty in any other Case. 2 *Hale's H. P. C.* 270.

The Prisoner, after he has challenged peremptorily his full Number, may challenge as many more as he can for good Cause.

Several
Kinds of
principal
Challenges
to the Polls.

Principal Challenges to the Polls may be reduced to four Heads, *viz.* 1. In respect of Dignity. 2. For Defect. 3. For Affection

Affection or Partiality. 4. For a Crime in the Party returned.

In respect of Dignity.

If any Peer of the Realm or Lord of Peer of Parliament be returned upon a Jury, he the Realm may be challenged by either Party, and or Lord of if neither Party challenge him, he may Parlia- challenge himself. *Dyer* 314. *Moor* 167. ment.

2 *Roll. Abr.* 646. 6 *Co.* 53. 9 *Co.* 49.

1 *Jones* 153. 1 *Inst.* 157. b.

For a Defect.

First, in respect of his Birth, it is a Aliens. good Challenge to a Juror that he is an Alien; for an Alien ought not to be upon a Jury, except on a Trial *per Medietatem Linguae*. 14 *H.* 4. 19. b. 7 *Co.* 18. *Calvin's Case*. 10 *Co.* 104. 1 *Inst.* 157. b.

Secondly, in respect of his Condition; Villeins. as if he be a Villein. 1 *Inst.* 157. b. 2 *Roll. Abr.* 657.

Thirdly, in respect of his Age: It is a Infants. good Challenge to a Juror that he is not twenty-one Years of Age. *Mirror* c. 3. 1 *Inst.* 158. a. *vide antea* fo. 36.

Fourthly, in respect of his Estate: Of Estate. this we have spoken fully before, fo. 21, &c.

For Affection or Partiality.

This is either a principal Challenge, or to the Favour, and is either by Judgment of Law without any Act of his, or by Judgment of Law upon his own Act.

Without any Act of his.

As if the Juror be of Kin to either Kindred. Party; and that is of two Sorts, either by Blood, called *Consanguinity*, or by Marriage, properly called *Affinity*. *Consanguinity*, how far remote soever, even to the

the ninth Degree, is a good principal Cause of Challenge. 21 E. 4. 63. b. (Consanguinity of the Half Blood is a good Challenge. 21 E. 4. 31. b.) Affinity or Alliance by Marriage is a principal Challenge, and equal to Consanguinity, when it is between the Juror and either of the Parties: As if the Plaintiff or Defendant married the Son, Daughter or Cousin of the Juror, or the Juror married the Daughter or Cousin of the Plaintiff or Defendant, and the Marriage continues, or Issue be had; but if the Son of the Juror had married the Daughter of the Plaintiff or Defendant, or the Son of the Plaintiff or Defendant, the Daughter of the Juror, this is no principal Challenge but to the Favour only. If a Body politic or corporate, sole or aggregate brings an Action that concerns their Body politic or Corporation, and a Juror is of Kindred to any that is of that Body, it is a good principal Challenge. 1 Inst. 157. 15 E. 4. 13. 28 Aff. 18. 21 E. 4. 11. Hob. 87. 1 Saund. 344. It is a good Challenge that the Juror is Brother to the Wife of the Plaintiff, for Man and Wife are one in Law. 21 E. 4. 32. Bro. Chall. 180. 2 Roll. Abr. 653. A Bastard cannot be of Kindred to any, and therefore Consanguinity alledged in a Juror who is a Bastard, or whose Ancestor was a Bastard, is no principal Challenge; but if the Juror and one of the Parties be descended from a Bastard who was married and had lawful Issue, then it is a good Challenge, for as to them he was not a Ba-

Bastard. 41 E. 3. 9. 21 E. 4. 31. b. Jenk.
7. pl. 90. If the Plaintiff challenge a
Juror for Kindred to the Defendant, it is
no Counterplea to say, that he is also of
Kindred to the Plaintiff, though in a
nearer Degree; for the Law requires
Jurors who are not of Kin to either Par-
ty. He who challenges a Juror for Kin-
red, must shew how he is Cousin,
but if the Consanguinity be found, though
in another Manner than is alledged by
the Challenger, it is sufficient; for the
Law prefers the Substance before the
Form. 1 Inst. 157. a. Being Uncle to
the Appellee is a good Cause of Challenge
by the Appellant; but the Appellee de-
nying him to be any Relation, the Court
directed it to be tried on a *Voir dire*.
Trin. 8 Anne, Young versus Slaughter-
ford, 11 Mod. 228.

If the Juror hath Part of the Land
depending upon the same Title, it is a Juror ha-
ving Land
principal Challenge. 1 Inst. 157. a. In held by
Ejectment the Plaintiff challenged one the same
of the Jury because he held Land under Title.
the same Title as the Defendant did,
which was proved by a Witness produ-
ced for the Plaintiff, and thereupon the
Juror was withdrawn. *Mich. 30 Eliz.*
Green versus Everard, 2 Leon. 40.
pl. 53.

If a Juror be within the Hundred, Juror
Leet, or any Way within the Seignory within the
immediately or mediately, or any other Distress of
Distress of either Party, it is a principal either Par-
Challenge; but if either Party be within ry.
the Distress of the Juror, it is only a
Challenge

Challenge to the Favour. 1 *Inst.* 157. a. 2 *Roll. Abr.* 651. If in Trespass the Defendant justifies as Servant to the Lord, and by his Command, it is a good Challenge to the Juror to say that he is Tenant to the Lord, though the Lord is no Party to the Record. 1 *Brownl.* 195. In Ejectment, a Juror was challenged for that he was Tenant of a Manor, to which there was a Court Lect, whereof the Plaintiff was Steward of that Manor; the Court inclined that this was no principal Challenge. *Allen* 29.

Witness.

If a Witness named in the Deed be returned of the Jury, it is a good Cause of Challenge of him. 1 *Inst.* 157. a.

Upon his own Act.

Where a Juror has given a former Verdict on the same Matter.

If a Juror has given a Verdict before for the same Cause; though the Judgment was arrested or reversed upon a Writ of Error, it is a principal Challenge; so it is if he has given a former Verdict upon the same Title or Matter, though between other Parties. But in this and all other like Cases, he who takes the Challenge must shew the Record, if he will have it take Place as a principal Challenge; otherwise he must conclude to the Favour, unless it be a Record of the same Court, and then he must shew the Day and Term. 1 *Inst.* 157. b. *Cro. Eliz.* 33. pl. 13. In 2 *Hawk. P. C.* 418. it is said to be no good Cause of Challenge, that a Juror has found others guilty on the same Indictment; for the Indictment in Judgment of Law is several against each Defendant, and every one must

must be convicted by particular Evidence
against himself.

It is a Challenge to a Juror, that he Juror an
was Indictor of the Plaintiff or Defen-Indictor.

stant either of Treason, Felony, Mispri-
tion, Trespas, or the like in the same
Cause. 1 *Inst.* 157. *b.* By the Statute

5 *E.* 3. *c.* 3. it is enacted, that no In-
dictor shall be put on Inquests upon De-
liverance of the Indicttees of Felony or
Trespas; and this has been adjudged a
good Exception, not only on the Trial of
the same Indictment, but also on the
Trial of another Indictment or Action,
wherein the Matter found in such former
Indictment is either directly in Issue, or
happens to be material. 1 *Sid.* 244.

2 *Harek.* *P. C.* 518. It was granted
that some of the Grand Jury, who found
the Bill, might be of the Petit Jury.

Mich. 11 *W.* 3. *Rex* versus *Kirke*,
12 *Mod.* 305. Upon an Indictment of
Battery, &c. a Juror was challenged by
the Defendants, because he was one of
the Grand Jury that found the Indict-
ment against them for the same Matter,
and the Challenge was allowed. *Pasch.*

17 *Car.* 2. *Rex* versus *Percival*, *Sid.*
244. *pl.* 4. *Et per Holt*, Chief Justice,
it is a good Cause of Challenge by the
Appellee to one of the Jury, that he was
one of the Grand Jury, who found the
Bill against the Appellee, upon which he
was indicted at the Assises. And the be-
ing of the Coroner's Inquest is a good
Cause of Challenge by the Appellee. *Trin.*

8 *Annæ*,

Challenges to the Polls.

8 *Anne, Young* versus *Slaughterford*,
11 *Mod.* 228.

Juror That the Juror is Godfather to the
Godfather Plaintiff's or Defendant's Child, or that
to either the Plaintiff or Defendant is Godfather
Party's or Godmother to the Juror's Child, has
Child. been allowed as a good Challenge. 1 *Inst.*
157. *a.* 2 *Roll. Abr.* 653, 654.

Juror been If a Juror has been Arbitrator chosen
an Arbi- by the Plaintiff or Defendant in the same
trator in Cause, and has been informed of, or treated
the Cause. of the Matter, it is a principal Challenge;
but it is otherwise if he has not been in-
formed of or treated of the Matter; and so it
is if he was indifferently chosen by either
of [*q.* both] the Parties, though he has
treated of the Matter. 1 *Inst.* 157. *b.*
13 *H.* 4. 13. 3 *H.* 6. 24. *b.* 20 *H.* 6.
39, 40. 7 *H.* 7. 10. 2 *Roll. Abr.* 655.

Or Com- But that a Juror was a Commissioner
missioner chosen by one of the Parties for Exami-
to examine nation of Witnesses in the same Cause, is
Witnesses. no principal Cause of Challenge; for he
is made by the King under the Great
Seal, and not by the Party, as the Arbi-
trator is, but he may upon Cause be
challenged for Favour. 1 *Inst.* 157. *b.*
Godb. 193. 9 *Co.* 71. *a.* 7 *H.* 7. 10. *b.*
9 *E.* 4. 46. 3 *H.* 6. 24. *b.* 2 *Roll.*
Abr. 656.

Juror inti- It is a good Cause of Challenge that a
tled to For- Juror hath a Claim to the Forfeiture to
feiture to be caused by the Conviction. 2 *Hawk.*
be caused *P. C.* 418. *State Trials*, vol. 1. fo. 502.
by Convic-
tion.

It is a good Cause of Challenge that Juror declared his
 1 Juror hath declared his Opinion before-hand; yet this has been adjudged to be Opinion
 no Cause of Challenge where it has ap- before-
 appeared to proceed not from any Ill-will, hand.
 but from a Knowledge of the Cause.

2 Hawk. P. C. 418. Upon a Trial at Bar a Juror was challenged for that he had said to one of the Parties, *Provide you to pay, for if I am sworn I will give my Verdict against you.* And the Party himself was allowed to be sworn to prove the Truth of his Challenge; and the Triers for this Cause found the Juror not to be indifferent, and therefore he was withdrawn. 1 Bulst. 20. In Evidence to an Inquest it was observed, 1st, The Issue being a Way or not a Way, a Juror was challenged, and being for the King, Cause was shewed presently that he had said *that it was a Way*, and if proved otherwise it would be a Prejudice to the Country; which being proved, he was set aside. 1 Keb. 71. On an Indictment for High Treason it is a good Challenge to a Juror, that he has declared that the Prisoner was guilty, or would be hanged.

1 Salk. 153.

If the Issue be whether such a County In a Suit
 is bound to repair a Bridge, one of the about re-
 County is no good Juror, tho' he may be pairing a
 a good Witness. Mich. 3 Anne, The County
 Queen against The Inhabitants of the Bridge,
 County of Wilts. 6 Mod. 307. one of that
 County
 not a good Juror.

Challenges to the Polls.

Juror of
Counsel,
Servant,
&c. to ei-
ther Party.

If a Juror be of Counsel, Servant, or of the Robes or Fee of either Party, it is a principal Challenge. 1 *Inst.* 157. *b.*

Juror eat-
ing at
Party's
Charge.

If any, after he be returned, do eat and drink at the Charge of either Party, it is a principal Challenge. 1 *Inst.* 157. *b.* 13 *H. 4.* 13.

Actions
between
the Juror
and either
Party.

Actions brought either by the Juror against either of the Parties, or by either of the Parties against him, which imply Malice or Displeasure, are Causes of principal Challenge, unless they be brought by Covin, either before or after the Return; for if Covin be found, then it is no Cause of Challenge; other Actions which do not imply Malice or Displeasure, are Cause of Challenge to the Favour only. 1 *Inst.* 157. *b.* 2 *Roll. Abr.* 656. *Style* 129.

Juror a
Parishio-
ner.

In a Cause where the Parson of a Parish is Party, and the Right of the Church comes in Debate, that a Juror is a Parishioner is a principal Challenge; but it is not in an Action of Debt, or any other Action where the Right of the Church does not come in Question. 1 *Inst.* 157. *b.*

Labouring
a Juror to
give his
Verdict.

If either Party labour the Juror, and give him any thing to give his Verdict, this is a principal Challenge; but if either Party labour the Juror to appear and do his Conscience, this is no Challenge at all, but lawful for him to do. 1 *Inst.* 157. *b.* But a Stranger doing the same is an Embracer. *Hob.* 94.

That

That the Juror is Fellow Servant with Juror Fel-
either Party is no principal Challenge, low Ser-
but to the Favour. 1 *Inst.* 157. b. vant with
Dier 367. either Par-
ty.

For a Crime in the Party returned.

If the Juror be attainted or convicted Juror at-
of Treason or Felony, or for any Offence tainted of
to Life or Member, or in Attaint for a Treason,
false Verdict, or for Perjury as a Witness, Felony,
or in a Conspiracy at the Suit of the &c.

King, or in any Suit (either for the
King, or for any Subject) be adjudged to
the Pillory, Tumbrel, or the like, or to
be branded or stigmatized, or to have
any other corporal Punishment whereby
he becomes infamous; these and the like
are principal Causes of Challenge. So it
is if a Man be outlawed in Trespass,
Debt, or any other Action; and in old
Books it is said, that if a Person be ex-
communicated he cannot be a Juror.

1 *Inst.* 158. a. The Statute 11 H. 4. ex-
tends to Persons outlawed in personal
Actions, because an outlawed Person is
not accounted *probus & legalis Homo*, to
be sworn in an Inquest, and may be chal-
lenged for that Cause. *Withipole's Case*,
Cro. Car. 134. 1 *Jones* 198. 2 *Hawk.*
P.C. 417. *Per Coke*, Chief Justice, if
a Man be attainted of Felony and par-
doned, he shall not afterwards be sworn
of a Jury, for that he is not *probus &*
legalis Homo; for *Poena mori potest, Cul-*
pa perennis erit; and therefore such a
one shall not be sworn in an Inquest; and
this is a good Challenge to a Juror re-
turned to serve, that he hath been before

Challenges to the Polls.

attainted of Felony, and tho' pardoned for the same, yet he is not fit to serve on a Jury. 2 *Bulst.* 154. 1 *Brownl.* 34. And so of Forgery on *Stat. 5 Eliz. c. 14.* And Serjeant *Hawkins* says it hath been holden that such Exceptions are not saved by a Pardon; and yet he says, it seems, that none of the above cited Challenges are principal ones, but only to the Favour, unless the Record of the Judgment or Conviction be produced, if it be a Record of another Court, or the Term, &c. shewn, if it be a Record of the same Court. 2 *Hawk. P. C.* 417.

To the Favour.

Juror of Kindred, or under the Distress of him in the Reversion, &c.

Challenges for Favour must be left to the Conscience and Discretion of the Triers, upon hearing the Evidence. Something of this has been mention'd before. But some of them come nearer to principal Challenges more than others; as if a Juror be of Kindred, or under the Distress of him in the Reversion or Remainder, or in whose Right the Avowry or Justification is made, or the like; these are no principal Challenges, because he in the Reversion or Remainder, or in whose Right the Avowry or Justification is, is not Party to the Record; but it is otherwise if they were made Parties by Aid, Receipt, or Voucher, and yet the Cause of Favour is apparent; and so it is of all principal Causes, if they be Parties to the Record. 1 *Inst.* 157. *b.* At a Trial at Bar, the Question was, whether the Fair called *Waybill Fair*, should be kept at *Waybill* or *Andover*. One of the

the Jury, who lived at *Waybill*, was challenged, for that the Fair would occasion Manure to the Ground. On the other Side it was considered, that the Fair occasioned trampling of the Grass; and this being a Challenge to the Favour, two of the Jurors were sworn to be *Triers*, and their Oath was, *You shall well and truly try whether A.* (the Juror challenged) *stands indifferent between the Parties.* Trin. 1 W. & M. Anon. 1 Salk. 152.

Challenges for Default of Hundredors.

BY the Common Law in a Plea real, For Default personal, or mixt, there ought to be fault of four of the Hundred, where the Cause of Action arose, returned for the better Notice of the Cause; for *Vicini Vicinorum facta praesumuntur scire*; by the Statute 35 H. 8. c. 6. it was enacted that there should be six of the Hundred returned; by the Statute 27 Eliz. c. 6. the Number was reduced to two in personal Actions. 1 Inst. 157. a. But now by the Statute 4 & 5 Anne, c. 16. no Hundredors are required except in criminal Prosecutions and penal Statutes, because in other Cases the Jury shall come from the Body of the whole County.

3. If the Lord of the Hundred be a Party, there need no Hundredors to be returned at all; if it be of the Body of the

Challenges for the Hundred.

County, or of the next Hundred, it is sufficient. *1 Inst. 157. a.*

4. If an Action be brought against a Hundred, on the Statute of *Winchester*, the Jury must come from the next Hundred where the Robbery was committed. *2 Roll. Abr. 595. Comb. 332.*

5. He who takes a Challenge for the Hundred, must shew in what Hundred the *Venue* lies, and he must take it before so many are sworn as will serve for the Hundred. He, who is challenged for the Hundred, shall not be drawn absolutely, but remain besides for the Hundred. *1 Inst. 157. a.*

6. If a Person dwell in the Hundred, whether he have any Freehold there or not, or if he had a Freehold there when he was returned, and sell it before he appears, he is a good Hundredor; but if he sell all his Freehold he may be challenged absolutely. *1 Inst. 157. a.* A Jury being ready at the Bar, the Array was challenged for Default of Hundredors, to which it was answered, that the Jury by Rule of Court was struck by the Secondary, and that the Hundredors were struck out by Consent, yet the Court held it a good Challenge notwithstanding the Consent. *Style 233.*

7. By *Hale*, Chief Baron, it is against the common Course to take a Challenge, for Want of Hundredors, when the Trial is at the Bar upon a Jury returned at the Denomination of an Officer of the Court where there are but twenty-four left by the Parties themselves. *Hard. 228.* But an Information of Forgery being to be tried at
Bar

Bar, it was moved that the Defendant might not challenge for Want of Hundredors. *Sed non allocatur*; for the Court said that the Plaintiff may be deprived, because he brings it on to be tried at the Bar, yet the Defendant may not, though each Party by Rule strike out twelve of the forty-eight returned, and so the Defendant by striking out Hundredors may prevent the Trial; yet it being a Privilege allowed by Law, the Court cannot deprive him of the Challenge. 3 *Keb.* 740.

By *Hale*, Chief Baron, there are two Sorts of Challenges for Default of Hundredors; the one to the Array, where the Sheriff returned none of the Hundred; the other to the Polls where none of the Hundred appeared; but if this Challenge be taken to the Polls, it must be taken presently, and the special Cause assigned, *viz.* Want of Freehold there. *Hard.* 228.

8. In an Information in the Nature of a *Quo Warranto* against the Mayor of *Tiverton*, the Defendant entered into the Common Rule by Consent, for the Master to strike the Jury, who accordingly struck forty-eight, the Defendant struck out twelve of these, and the Prosecutor struck out twelve more, and the remaining twenty-four were returned by the Sheriff to try the Cause. The Defendant having artfully struck out all Hundredors named by the Master, at the Assizes challenged the Array for Want of Hundredors; the Court held that the

Challenges by the King.

Challenge was good, but that the Rule being made by the Defendant's Consent, this Challenge was a Contempt of the Court, and therefore granted an Attachment against him. *Trin. 10 Geo. 1. Rex versus Burrige, Trials per Pas 158. 8 Mod. 245. Vide antea fo. 68, 69.*

Challenges by the King.

THE King may take a principal Challenge to the Array or to the Polls. *4 H. 7. 2. Bro. Chall. 154.* Or he may challenge the Array, or the Polls for Favour, though such Challenges for Favour shall not be allowed against him. *38 Aff. p. 18, 19. 44 E. 3. 38. Chall. F. 98. B. 22. 4 H. 7. 8. Chall. F. 65. B. 155.* But some have said that it is a good Challenge for the Party to the Array that the Sheriff is a *Valent* of the Crown or other special menial Servant. *22 E. 4. Fitzh. Chall. 63.* or that the Sheriff is his Adversary. *4 H. 7. 8. F. Chall. 65. 1 Inst. 156. a. Stamf. P. C. 162.*

And it is said to be a principal Challenge against the King that a Juror is of his Livery, or his immediate Tenant. *2 Hawk. P. C. 418.* In an Information for Forgery, the Defendant challenged one of the Jury, for that the Prosecutor had been lately entertained at his House; And this was admitted to the Favour tho' against the King. *Pasch. 29 Car. 2. Anon.*

Anon. 1 *Vent. Rep.* 309. *Sed vide Cro. Eliz.* 663.

It has been held to be a good Challenge on the Part of the King, that the Juror hath given his Dogs the Names of the King's Witnesses. 2 *Hawk. P. C.* 418.

By the Common Law the King might have challenged peremptorily any Number, without shewing any Cause, only alledging that they were not good for the King; but this proving very mischievous to the Subjects, and tending to infinite Delays and Danger, by the Statute 33 *Ed. 1.* commonly called *Ordinatio de Inquisitionibus*, it is enacted, that of Inquests to be taken before any of the Justices, and wherein our Lord the King is Party, howsoever it be, it is agreed and ordained by the King and all his Counsel, that from henceforth, notwithstanding it be alledged by them that sue for the King, that the Jurors of those Inquests, or some of them, be not indifferent for the King, yet such Inquests shall not remain untaken for that Cause; but if they that sue for the King will challenge any of those Jurors, they shall assign a certain Cause of their Challenge, and the Truth of the same Challenge shall be inquired of according to the Custom of the Court. 1 *Bulst.* 85. *Moor* 595. 1 *Inst.* 156. 2 *Inst.* 431. 2 *Hale's H. P. C.* 271. *Stamf. P. C.* l. 3. c. 7. fo. 162.

Challenges by the King.

Either in
civil or
criminal
Causes.

The Words of this Statute being general, it extends to all Suits in which the King is a Party as well civil as criminal.
1 Inst. 595.

But need
not shew
the Cause
of his
Challenge
till the
Panel is
gone
through.

If the King challenge a Juror before the Panel is perused, he is not bound to shew any Cause of his Challenge till the whole Panel be gone through, and it appears that there will not be a full Jury without the Person so challenged; and if the Defendant, in order to oblige the King to shew Cause presently, challenge *touts paravaile*, yet he shall shew all his Causes of Challenge before the King need shew any. *38 Aff. p. 22. Bro. Chall. 141. 1 Inst. 156. 1 Bulst. 85, 194. 1 Vent. 309. T. Raym. 473. Skin. 82.*

A Challenge may be released for the the King. *20 Aff. p. 13. Bro. Chall. 110.*

When the King is a Party, the Defendant that challengeth must shew Cause presently. *2 Hale's H. P. C. 271. 1 H. 5. 10. 38 Aff. 22. 1 Inst. 158. a.*

On an Indictment for Murder, eleven of the Jurors appeared and were sworn, but one was challenged for the Prisoner, whereupon a *Tales* was awarded, and the Trial stayed; and now one of the Jurors, who had appeared and was sworn the first Day, was challenged for a Cause which was *in esse* then, but not known then to the Queen's Council, but it was held that the Queen could not have the Challenge now no more than she could have had at the first Day after the Juror was sworn, although the same Cause
still

still continued. *Mich.* 44 & 45 *Eliz.*
Wharton's Case, *Tel.* 23. *Noy* 48.

Indictment for Murder. *Curia*: The King, or any for him may not challenge without good Cause; but the Prisoner *in Favorem Vitae*, may peremptorily challenge thirty-four without shewing any Cause, and as many more as he can with Cause, shewing the same presently. 3 *H.* 7. 2, 12. 9 *H.* 5. 7. The Counsel for the King moved, that they might be suffered to shew the Cause of their Challenge particularly as they took the Challenge. *Curia*: When the Jurors who are not challenged are sworn, then, and not before, you are to shew the Cause of your Challenge. And any one may be received to challenge for the King, if he thinks that any of the Jury are not indifferent. *Mich.* 8 *Jac.* 1. *The King* against *Morgan*, 1 *Bulst* 85.

Where the King is Party in a Trial here, if the other Side challenge a Juror, he ought here to shew his Cause of Challenge presently, and two Triers shall be chosen, *scil.* the two former which are sworn, and they are to inform the Court, whether for the Cause shewn, or any other Cause, the Juror be indifferent or not. *Pasch.* 10 *Jac.* 1. 1 *Bulst.* 194.

*At what Time a Challenge may
be taken.*

The Plaintiff, before the *Venire*, may alledge Cause of a principal Challenge between himself and the Sheriff, and if the Defendant will confess it, have Process to the Coroner.

IF the Plaintiff before any *Venire facias* awarded, says that he is of Kin to the Sheriff, or shews any other principal Challenge between him and the Sheriff, and upon this prays a *Venire facias* to the Coroners, and the Defendant denies the Cause of the Challenge, and so the Writ is awarded to the Sheriff, the Defendant shall not have the same Challenge to the Array, which was before alledged by the Plaintiff and denied by himself. But the Defendant may challenge the Array for any other Cause; as if the Plaintiff alledged Consanguinity between his own Wife and the Sheriff, and this is denied by the Defendant, and upon this Process goes to the Sheriff, the Defendant may challenge the Array for Consanguinity between the Plaintiff himself and the Sheriff; for this is another Cause than what was alledged by the Plaintiff; and though the Defendant might at first have had the Writ to the Coroners, yet because he could not have had it without acknowledging a Falstiy, he shall not be estopped to take the Challenge. By *Hobart* and *Winch*, *Hutton econtra. Mich. 16 Jac. 1. Aier verses Banister. 2 Roll. Abr. 645. Hutt. 24. 1 Brownl. 127. Mcor 895. pl. 1259. 1 Inst. 157. b.*

There

There can be no Challenge to the Ar-
ray or to the Polls till a full Jury ap-
pear; and therefore, if a full Jury do
not appear, the Plaintiff, if he would
challenge the Array for an Exception to
the Sheriff, must first pray a *Tales*, and
after the Jury is made full by the *Tales*,
but before any Juror is sworn, he may
challenge the Array. And the Plaintiff
is not estopped by his suing out the *Ve-
nire facias* to the Sheriff to challenge
the Array for Consanguinity, Affinity, &c.
between the Sheriff and the Defendant.
Vicars versus Langham, Hob. 235, 296.
2 Roll. Abr. 645. Jenk. 310. pl. 88.

After a Challenge to the Array tried,
the Party cannot challenge the Array
again for another Cause, for then it should
be infinite. *4 H. 7. 8. Bro. Chall. 155.*

After a Challenge to the Array, the
Party may challenge the Polls; but af-
ter a Challenge to the Polls there can
be no Challenge to the Array. *1 Inst.*
158. a.

No Chal-
lenge to
Array, af-
ter Chal-
lenge to
the Polls.
Sedecontra.

After a Juror has been sworn, he can-
not be challenged without Consent either
in a criminal or civil Case, or either
at the Suit of the King, or of a Subject;
whether on the same Day, or, according
to the better Opinion, on a former Day
on the same Trial, unless it be for some
Cause happened since he was sworn.
1 Inst. 158. a. Tel. 23. Cro. Car. 291.
Hob. 235. 2 Roll. Abr. 658. Jenk. 310.
2 Brownl. 275. 2 Hale's H. P. C. 274.
A Juror was put by after he was sworn
because

Juror not
to be chal-
lenged af-
ter sworn,
unless, &c.

because of Kin to the Plaintiff. *Clayt.* 78. *pl.* 130. A Person indicted of Buggery challenged one of the Jurors who was the Foreman, and was sworn and marked sworn by the Clerk before the Challenge was heard by the Court, and because the Attorney General would not consent to alter the Record, the Challenge was disallowed. *Cro. Car.* 291.

After the Array is affirmed, a Man shall not have such Challenge to a Juror, as would have been sufficient Challenge to the Array; and therefore it is not a good Challenge to a Juror that he was put in at the Denomination of the other Party; for this would have been a good Challenge to the Array; which the Party by not challenging has admitted to be good. 49 *E.* 3. 1. *b.* 2. *b.* 49 *Aff.* 1. 2 *Roll. Abr.* 658.

Peremptory Challenge after Challenge for Cause. If in Treason or Felony the Person challenge a Juror for Cause which is found against him, he may afterwards challenge him peremptorily. 1 *Inst.* 158. *a.* 32 *H.* 6. 26. *Bro. Chall.* 193. 14 *H.* 7. 19. *Bro. Chall.* 75.

Challenge for Hundred when. A Challenge for the Hundred must be taken before so many be sworn as will serve for Hundredors, or else the Party loses the Advantage thereof. 1 *Inst.* 158. *a.*

After Juror challenged by one Party and tried, If a Juror be challenged by one Party and found indifferent, or the Party releases his Challenge, the other Party may challenge him by the other Party.

challenge

challenge him afterwards. 1 *Inst.* 158. a.
9 *E.* 4. 16. 37 *H.* 6. 8. *Sed vide* Godb.
234. p. 325.

He who hath several Causes of Challenge against a Juror, must take them all at once. 1 *Inst.* 158. a.

Several Causes of Challenge to be taken together.

If the Defendant does not appear when he is called at the Trial, he loses his Challenges to the Jurors, although he does afterwards appear. *Trials per Pais* 146. (175.)

In what Cases he who challenges shall shew Cause immediately.

IF after a Challenge taken by the Defendant to the Array, and two Triers are elected and sworn, and the Jury returned found to be indifferent, the Defendant, who challenged the Array, challenges the Jurors by the Polls, he ought then to put in and shew the Cause of his Challenge presently; otherwise it is where there are no Triers sworn; for there he is not to shew Cause of his Challenge until the other Jurors, who are not challenged, be sworn; and so it is if the Plaintiff had challenged in this Case any of the Polls, he should not have been compelled to shew Cause till the Panel was perused and all the rest sworn. 1 *Bulst.* 113, 114, 115. *Moor* 846. 2 *Roll.* *Abbr.* 659.

On Challenge to the Polls after Challenge to the Array by the same Party, and found against him, he shall shew Cause immediately.

But

Of Trying Challenges.

But if there are two Defendants, and the one challenges the Array, and after he and the other challenge a Juror, the other shall not shew his Cause immediately. 33 H. 6. 21. b.

If a Juror be challenged for a Matter of later Time, since he was sworn, Cause must be shewn immediately. 14 H. 7. 6. 2 Roll. Abr. 659.

Where the King is a Party, and the other Side challenges a Juror, he must shew cause immediately, and all his Causes together. *Viner*, Tit. Trial, 277. pl. 6, 7, 8, 9, 10.

If the King challenges a Juror before the Panel is perused, it is agreed, that he need not shew any Cause of his Challenge till the whole Panel be gone through, and it appears that there will not be a full Jury without the Person so challenged. And if the Defendant, in order to oblige the King to shew Cause presently, challenges *tout paravail*, yet it hath been adjudged, that the Defendant shall be first put to shew all his Causes of Challenge, before the King need to shew any. 2 Hawk. P. C. 413. 1 Vent. 309. T. Raym. 473. Skin. 82. Moor 595. pl. 809.

Of Trying Challenges.

Principal,
or to the
Favour.

A Principal Challenge being found true, is of itself sufficient to set aside the Array, or the Juror, without leaving any thing

thing to the Conscience or Discretion of the Triers. 1 *Inst.* 156. *b.* But a Challenge to the Favour must be left to the Conscience or Discretion of the Triers, upon hearing the Evidence, to find favourable or not favourable. 1 *Inst.* 157. *b.*

If the Array is challenged, there shall be but two Triers, unless it be by the Assent of the Parties. 21 *E. 4.* 59. *Bro. Chall.* 182. *Vide* 23 *Aff.* p. 18. *Bro. Chall.* 205. A Challenge cannot be tried by one Trier only, 20 *Aff.* 10. and the Appointment of the Triers of a Challenge to the Array, seems to be in the Discretion of the Court; sometimes two Attornies have been appointed to try the Challenge, sometimes two Coroners. 20 *Aff.* 10. *Bro. Chall.* 108. 21 *Aff.* 26. 27 *Aff.* 28. *Bro. Chall.* 121. And sometimes two of the Panel. 23 *Aff.* 18. 29 *Aff.* 3. *Bro. Chall.* 205, 132. 9 *E. 4.* 5. *Bro. Chall.* 81. And it has been said, that where the Array is challenged for a Default in the Sheriff or his Officers, the Coroners shall try the Challenge, but when for a Default of the Bailiff of a Franchise, the Sheriff or Triers chosen by him shall try it. 2 *Aff.* p. 26. *Bro. Chall.* 111. 22 *Aff.* 3. *Bro. Chall.* 204. The Sheriff returning one Panel, and the Bailiff of a Franchise returning another Panel, and both Panels being challenged were tried by foreign Triers, not by any of either Panel. 31 *Aff.* p. 10. *Bro. Chall.* 206. An Issue being to be tried by a Jury of two Counties, *viz.* of the County of *W.* and the County of *S.* and

Of Trying Challenges.

and both Arrays being challenged, two of the County of *W.* shall try the Array of that County, and two of the County of *S.* shall try the Array of the County of *S.* 11 *H.* 4. 63. *Chall. B.* 46. *F.* 88. Or one Trier may be taken out of one Panel, and another out of the other. 34 *H.* 6. 36. *Bro. Chall.* 17.

If an Array be challenged, and all the Jurors are challenged on the one Side and the other, upon the Trial of the Array, the Court shall chuse two Triers at their Discretion; but if there be any not challenged by either Party, then the one Party shall chuse one of his Challenge, and the other shall chuse another of the Challenge of the other Party. 7 *H.* 4. 46. *Bro. Chall.* 40. The Array was challenged by the Defendant, and two Triers were assigned by the Court, the Defendant said they were two Friends of the Plaintiff, and therefore he would not agree to them; upon which the Court assigned two other Triers, the Defendant refused them. *Fitzherbert*: We will assign Triers again, and you shall not chuse, but they shall be the Triers; for that is the Order of the Law, and thereupon he named the third and the ninth; and tho' the Defendant objected to them, they were sworn to try the Array. 27 *H.* 8. 26. The Defendant having challenged the Array, for that the Sheriff was within the Plaintiff's Distress, the Court appointed Triers, the Defendant said, that all the Jurors were favourable, and prayed Triers *De Circumstantibus*.

tribus. Gawdy: That cannot be but only in Affise. 9 E. 4. *Curia*: We cannot appoint other Triers in this Case but only of the Jurors; wherefore let the fourth and seventh be triers, but you may refuse them and take others if you will, the Defendant refused the fourth, and thereupon the third was appointed; and they found the Array favourably made, and it was quashed. *Trin. 30 Eliz. Blunt versus Delabere, Gouldsb. 91.*

This Difference has been taken, that if the Challenge be for Kindred in the Sheriff, it is more fit to be tried by two of the Jurors returned on the Panel; if the Challenge found in Favour of Partiality, then by two Triers to be assigned by the Court. 1 *Inst.* 158. 2 *Hale's H. P. C.* 275. 2 *Roll. Rep.* 363. 23 *Aff.* 18. 27 *Aff.* 28. 29 *Aff.* 3. 31 *Aff. p.* 10. 7 *H.* 4. 10, 46. 11 *H.* 6. 3. 19 *H.* 6. 48. 34 *H.* 6. 36. 9 *E.* 4. 5, 46. 18 *E.* 4. 18. 14 *H.* 7. 2. 27 *H.* 8. 26. *Gouldsb.* 91. 1 *Bulst.* 114.

If the Array of the principal Panel be challenged, and also the Array of the *Tales*, and upon Trial the principal Panel is affirmed, they, who tried that Challenge shall try the Challenge to the Array of the *Tales*. 9 *E.* 4. 46. *Chall. F.* 57. *B.* 85. 14 *H.* 7. 2. *Bro. Chall.* 71. *Sed vide* 19 *H.* 6. 48 *Chall. F.* 33. *B.* 61.

If a Juror be challenged before any of On a the Panel is sworn, two Triers shall be Challenge appointed by the Court, and if he be to the found indifferent and sworn, he shall be Polls. added to the two Triers, and try the next Chal-

Of Trying Challenges.

Challenge, and when another being tried is found indifferent, the two Triers appointed by the Court shall be discharged, and the two Jurors who were tried and found indifferent shall try the rest of the Challenges. 1 *Inst.* 158. 2 *Hale's H. P. C.* 275. 20 *Aff. p.* 10. 15. *Bro. Chall.* 108, 203. 19 *H. 6.* 9. *Chall. F.* 32. *F.* 60. The Jury remaining for Default of Jurors, eight being sworn, and eight *Tales* being awarded, at the Return, the Defendant challenged all the *Tales*, and the Plaintiff all the rest for Matter since; the Court took Triers, one out of those challenged by the Plaintiff, and another out of those challenged by the Defendant. 28 *Aff. p.* 44. *Bro. Chall.* 120. All the Jurors were challenged but one, who was sworn, and commanded to chuse two to him, one out of them challenged by the Plaintiff, and another out of them challenged by the Defendant, and they tried one of the Panel to them, and then the two Triers were put out. 7 *H. 4.* *Chall. F.* 158. *B.* 33, 34. One Juror being sworn, and the rest being challenged by the Defendant, he who was sworn, was ordered to chuse to him one of his Companions to try the Polls. *Dier* 25. *a.* If six be sworn, and the rest challenged, the Court may assign any two of the six sworn to try the Challenges. 2 *Hale's H. P. C.* 275. Triers who have been sworn and tried the Challenge to the Array, and affirmed it, shall try the Challenges to the Polls; the like where the Party releases his Challenge to the Array, and

and challenges the Polls. 11 H. 6. 63. *Chall. F.* 88. *B.* 46. 27 H. 8. 26. All the Jurors being challenged, it was ordered that one of those challenged by the Plaintiff, and one of those challenged by the Defendant should be the Triers; whereupon the Defendant challenged him that was chosen for the Plaintiff, and shewed how that he was favourable to the Plaintiff; whereupon he was withdrawn notwithstanding the first Order. 9 H. 5. 11. *Chall. Bro.* 51. *Fitzb.* 73. The Plaintiff and Defendant could not agree in Triers, whereupon the Court ordered the Plaintiff to name four which he would not have, and the Defendant other four which he would not have, then the Court ordered the third and sixth Person between those to be Triers; who afterwards tried the Polls. 4 E. 4. 17. *Chall. Bro.* 164. *Fitzb.* 52. In a Writ of *Entree* the Plaintiff and Defendant could not agree upon Triers upon a Challenge; wherefore the one would have chose one, and the other another; but the Court would not suffer them, for this will be like two Champions; wherefore the Court elected the Triers. 16 E. 4. 7. *Bro. Chall.* 172.

Where the Array is challenged for Favour, the other Party may confess it or plead to it; if he pleads to it, the Judges assign Triers to try the Array, seldom exceeding two, who being chosen and sworn, the Associate, or other proper Officer, declares and rehearſes to them the Matter and Cause of the Challenge, and after he has ſo done, concludes to them thus, And ſo

Of trying
a Chal-
lenge.

Of Trying Challenges.

so your Charge is to inquire, whether it be an impartial Array, or a favourable one; after Proof made to them, they are to deliver their Answer to the Court, and, if they affirm it, the Clerk writes underneath the Challenge *affirmed*: But if the Triers find it favourable, then thus, *a true Challenge. Trials per Pais* 165. If they find the Panel not indifferent, and the Array is quashed, it is entered of Record; but if they find it indifferent, and the Array is affirmed, then they proceed to Trial, and no Entry is made. *Pasch. 9 Jac. 1. 1 Bulst. 114. 21 E. 4. Vide 1 Salk. 152.*

The Triers, as far as they act as such, are Officers of the Court, and liable to be punished for any Misdemeanor; and some have said, that if they find against Law and the Direction of the Court, they may be fined and imprisoned. *Palm. 363.*

It is no Challenge to a Trier to say, that after he was sworn he eat with the Defendant, &c. *Mich. 2 R. 2. Statb. Chall. 35. fo. & Mich. 11 R. 2. Fitzherb. 164.* The Array being challenged because it was made at the Devise of one *W.* who was of the Plaintiff's Counsel, and the Triers not being able to agree, were commanded into Ward; but *Thorpe* said, that as they were not sworn upon the principal, they ought not to be retained in Prison, and new Triers were chosen. *43 Aff. p. 36. Chall. Bro. 146.* Two Triers being chosen to try a Challenge to the Array; and they not being able to agree, and it being the Vigil of *St. Thomas*,

mas, they were by the Assent of the Parties permitted to go at large till another Day. 7 H. 4. 10. *Chall. Bro.* 36. *Fitzh.* 85. One Juror being challenged, found indifferent, and sworn in on the principal; and then another being challenged, Triers did not agree till the next Morning, who then disaffirmed the Challenge, they were then allowed Viſtuals, and afterwards tried other Challenges; but he that was first sworn in on the principal Panel was not allowed Viſtuals or Drink during the whole Time until the Verdict of the twelve was given on the principal Matter. 11 H. 4. 63. *Chall. Fitzh.* 88. *Bro.* 46. Two Triers were a whole Night in trying a Poll, and in the Morning gave their Verdict, and had Meat and Drink by Assent of the Parties. 20 H. 6. 24. *Bro. Chall.* 12. Whilst the Court is sitting, the Triers shall not have Keepers, but when the Court is risen they shall. 7 E. 4. 4. *Chall. Bro.* 167. *Fitzh.* 54.

If the Defendant challenge the Array for that the Sheriff or other Officer, who made it, is of Kin to the Plaintiff, tho' he must shew in what Manner they are of Kin to each other; yet if the Kindred be found to be in a different Manner it is sufficient; for Kindred is the Substance, and the Manner but Form. As where the Defendant challenged the Array for that it was made by J. N. the Under-Sheriff, who was Son of J. Son of W. the Brother of the Plaintiff; it was found that he was Son of J. Daughter of W. the

the Brother of the Plaintiff, and the Array was quashed. 19 H. 8. 7. *Bro. Chall.* 1. The Conveyance shall not be tried but only whether the Parties are Cousins or not. 7 E. 4. 4. *Chall. F.* 54. *B.* 167. If a Juror is challenged for being Tenant to either Party, it shall not be tried by what Service or Tenure he holds, but whether he is Tenant to him or not. 7 E. 4. 4. *Chall. Bro.* 167. *Fitzb.* 54.

The Inquest was awarded by Default of the Defendant, and the Plaintiff challenging several of the Jurors, the Clerk would have had them drawn without a Trial, because the Defendant by making Default had lost his Challenges, to which the Court would not agree, but had the Challenges tried; for the Court is a third Person, and ought not to suffer Wrong to be done. 2 H. 4. 14. *Chall. Bro.* 54. *Fitzb.* 76.

At the *Venire facias* & *Alias*, the Jury appeared, and all were challenged, and all except a few who made Default were tried; the Defendant would have those who appeared to try those now who made Default if they were sufficient; but it was not allowed, for they shall not be tried till they appear; for it may be that some are now sufficient, who will not be sufficient at the Day, &c. And those some are insufficient, who may be sufficient then. 27 H. 6. 4. *Bro. Chall.* 13.

When the Triers are sworn, Witnesses are to be produced to prove the Truth of the Challenge, and one Witness is sufficient.

cient. 1 *Show.* 173. On a Challenge to the Polls, the Juror challenged may be sworn on a *Voir dire* as to the Matter of Challenge, and may be asked such Questions as do not tend to his Disgrace, Infamy or Reproach; such as, whether he hath a Freehold, whether he hath an Interest in the Cause; and in a Civil Case, whether he hath given his Opinion beforehand upon the Right, which he might have done as an Arbitrator between the Parties. 49 *Aff. p.* 1. *Chall. F.* 100. *B.* 150. 49 *E.* 3. *p.* 1, 2. *Bro. Chall.* 25. 1 *Inst.* 151. *Trials per Pais*, 158. 1 *Salk.* 153. But a Juror cannot be asked whether he hath been whipped for Larceny, or convicted of Felony, or been committed to *Bridewell* for a Pilferer, or to *Newgate* for clipping and coining, or whether he is outlawed or the like. On a Trial upon an Indictment for High Treason, the Prisoner, in order to challenge a Juror, asked him whether he had not declared his Opinion beforehand, that the Prisoner was guilty and would be hanged; but it was held, that the Juror was not obliged to answer, because the Questions tended to his Reproach, as charging him with a Misdemeanor. *Kelling* 9. *Trials per Pais* 151. 1 *Salk.* 153.

If a Challenge be taken, and the other Side demur, and upon Debate the Judge over-rules it, it is entered upon the original Record; if it be at *Nisi Prius*, it appears upon the *Postea* what the Judge has done; but if the Judge over-rules upon Debate without a Demurrer, then

H. the

the Party's Remedy is to tender a Bill of Exceptions. *Skin.* 101. *Hutt.* 24. And the Bill of Exceptions must alledge that the Judge *refused* the Challenge, not that he *over-ruled* it. *Skin.* 101.

A Demurrer upon a Challenge is not like to a Demurrer upon a Plea, for in Case of a Demurrer upon a Challenge, as soon as the Demurrer is agreed on at the Bar, it is sufficient without other Circumstances, such as Counsel's Hand, &c. and the Prothonotaries of Right ought to enter it. 3 *Leon.* 222.

Of Trials per Medietatem Linguae.

Statute

28 E. 3.

ALL Manner of Inquests and Proofs, which be to be taken or made amongst Aliens and Denizens, be they Merchants or other, as well before the Mayor of the Staple as before any other Justices or Ministers, although the King be Party, the one half of the Inquest or Proof shall be of Denizens, and the other Half of Aliens, if so many Aliens and Foreigners be in the Town or Place where such Inquest or Proof is to be taken, that be not Parties, nor with the Parties in Contracts, Pleas, or other Quarrels, whereof such Inquests or Proofs ought to be taken; and, if there be not so many Aliens, then shall be put in such Inquests or Proofs as many Aliens as shall be found in the same Towns or Places, which be not thereto Parties, nor with the Parties as afore is said, and the Remnant of Denizens

nizens, which be good Men and not suspicious to the one Party nor to the other. Stat. 28 E. 3. c. 13. §. 2. As to Treason, this Statute is repealed by the Statute 1 & 2 Ph. & M. c. 10. for by that Act all Trials for Treason shall be according to the Common Law.

A *Scotchman* before the Union, and in Alien the Time of Queen *Elizabeth*, was held who. to be no Alien, and denied a Trial *per Medietatem Linguae*. Dier 304. pl. 51. 2 Hawk. P. C. 420.

One made Denizen by Letters Patent, Denisen is a Denizen within the Meaning of this who. Statute. 2 Hawk. P. C. 420.

In an Action or an Appeal by an Alien This Statute don't against an Alien, it is not necessary that the Jury be half Aliens and half Denizens; for the Words of the Statute are, *all Inquests, &c. between Aliens and Denizens*. 2 Hawk. P. C. 419. Cause between one Alien and another.

It was held, where an Action was brought by an Alien as Administrator of *J. S.* who was *English*, the Parties being at Issue, and the Trial *per Medietatem Linguae*, that it was not well tried, and the Judgment was staid; for when the Plaintiff brings an Action not in his own Right but as Administrator, the Trial shall be by *English* only, and so it was held 23 *Eliz.* in Dr. *Julio's* Case; but if it had been averred that the Intestate had been an Alien, it would be otherwise. *Wyngate versus Marke, Cro. Eliz.* 275. Nor where an Alien sues in *Au-ter Droit*.

This Statute does not extend to Grand Nor to Juries; for they should be all Denizens, Grand Ju-

and a Bill of Indictment found by them against an Alien, is good. 2 *Hawk. P. C.* 419.

Nor to Jurors on a Writ of Inquiry. If in an Action against an Alien, he lets Judgment go by Default, whereupon a Writ of Inquiry of Damages is to be executed, the Jury shall be of *English*, and not of Aliens; for it is out of the Statute. *Needham versus Corjellis, Cro. Eliz.* 293.

Not necessary that the Alien Jurors have any Lands, &c. Where a Trial is by *Medietatem Linguae*, the Statutes requiring that Jurors shall have Lands to a certain Value, extends only to the Denizens, and not to the Aliens; for an Alien can have no Lands. And though the Words of the *Venire* be *Each of whom has ten Pounds by the Year, &c.* they shall be referred only to the *English*. *Cro. Eliz.* 272, 841. 2 *Hawk. P. C.* 419.

When the Party must claim the Benefit of this Trial. If an Alien neglects to pray the Benefit of the Statute upon the Awarding of the *Venire Facias*, he can neither except to the *Venire*, nor pray a subsequent Process *de Medietate Linguae*, and the Trial in such Cases being by a Jury of *English*, the Judgment shall not be erroneous. *Dyer* 28. *pl.* 180, 144. *pl.* 60. 304. *pl.* 51. 357. *pl.* 45. 21 *H.* 7. *M.* 3 *Ed.* 4. 12. 22 *Ed.* 3. 14, 20. 2 *Roll. Ab.* 643. even tho' it appear by the Declaration that the Defendant is an Alien. *Heyward versus Iyppson, Cro. Eliz.* 869. Lord Hale says, that if upon an Indictment of Felony against an Alien, he pleads Not guilty, and a common Jury is returned, and he does not surmise his being an Alien before any of

of the Jury are sworn, he has lost that Advantage; but if he alledges that he is an Alien, he may challenge the Array for that Cause, and thereupon a new Precept or *Venire* shall issue, or an Award to made of a Jury *de Medietate Linguae*; but that it is more proper for him to surmise it upon his Plea pleaded, and thereupon to pray it. 2 *Hale H. P. C.* 272.

On a Motion in Arrest of Judgment, The Return after a Trial *per Medietatem Linguae*, it turn of the was insisted that the *Venire Facias* was *Venire* not well returned, because Aliens and Denizens were returned together; whereas there ought to have been twelve Denizens by themselves, and twelve Aliens by themselves, returned; and there ought to have been one Denizen and one Alien, and so another Denizen and another Alien in their Turns sworn upon the Jury, which could not be done here, because it appears not by the Panel, who is a Denizen, and who is an Alien, & *sic non constat*, which of them were sworn; and of that Opinion was *Gawdy* and *Clinch, caeteris absentibus*: Whereupon Judgment was stayed; and afterwards all the Justices held the Return to be bad; for that it appeared not who were Aliens and who Denizens; but that it was a Mis-return only, aided by the Statute 18 *Eliz.* Wherefore upon Affidavit made, that six Denizens and six Aliens were sworn, the Plaintiff had Judgment. *Goodwin versus Mountenagh, Cro. Eliz.* 818, 841. If there appear not six Denizens and six Aliens, the Justices of *Nisi Prius* may award a *Tales* pursuing the principal Panel.

Panel. 10 Co. 104. Aliens only were returned upon the *Tales*, and not *de Medietate Linguae*, and held to be well; for if Aliens only were wanting, it was sufficient to return them. *Cæsar versus Curser, Cro. Eliz.* 305. Six *English* and five Aliens appeared, & *alius alienigena*, at the Prayer of the Plaintiff, was granted, and held well. *Cro. Eliz.* 841.

The Sheriffs returning those for Aliens who are not, is no Conclusion to the Party.

Whether the Aliens to be returned, are to be of the same County with the Party, or Aliens of any Country.

If on a *Venire* of half Denizens and half Aliens, the Sheriff return some as Aliens, who in Truth are not, the Party is not concluded by the Sheriff's Return, but may, notwithstanding, challenge the Array for want of a sufficient Number of Aliens. 2 *Rol. Abr.* 643.

Some Precedents of Awards of the *Venire Facias de Medietate Linguae*, mention, that the Aliens to be returned should be of the same Country with the Alien who is Party to the Suit; other of the Precedents mention that they should be Aliens generally, not specifying any particular Country; and these last seem to be most agreeable to the Words of the Statute, and to be confirmed by late Practice, and the greater Number of Authorities. 2 *Hawk. P. C.* 420.

Vide postea, Fol. 165, 166.

Of Drawing and Swearing the Jury, and the Methods of Trial.

THE Name of each Person summoned and impanelled, with his Addition and Place of Abode, shall be written in distinct Pieces of Parchment or Paper of equal Size, and shall be delivered to the Marshal of the Judge of Assize or *Nisi Prius*, or of the Great Sessions, or of the Sessions of the Counties Palatine, who is to try the Causes in the said County, by the Under-Sheriff, and shall, by the Direction of the Marshal, be rolled up all in the same Manner, and put into a Box or Glass; and when a Cause is brought on to be tried, some indifferent Person shall, in open Court, draw out twelve of the Papers; and if any of the Persons drawn shall not appear, or be challenged and set aside, then a further Number, till twelve be drawn who shall appear; and the said twelve Persons so first drawn and approved, their Names being marked in the Panel, and they being sworn, shall be the Jury to try the Cause; and the Names of the Persons sworn shall be kept apart in some other Box, &c. till the Jury have given in their Verdict, and the same is recorded, or till the Jury be discharged; and then the same Names shall be rolled up again, and returned to the former Box, &c. to be kept with the other

On Trials before Judges of Assize and *Nisi Prius*, Jurors to be drawn by Ballot.

Of Swearing the Jury.

Names, as long as any Cause remains to be tried. *Stat. 3 Geo. 2. c. 25. §. 11.*

If a Cause comes on before former Jury discharged, twelve of the residue to be drawn. If a Cause shall be brought on to be tried, before the Jury in any other Cause shall have brought in their Verdict or be discharged, the Court may order twelve of the residue to be drawn, as before, for Trial of the Cause. *Stat. 3 Geo. 2. c. 25. §. 12.*

Penalty on Juror not appearing. Every Person whose Name shall be drawn, and shall not appear, being called three times, on Oath made that such Person had been summoned, shall forfeit for every Default (unless some reasonable Cause of Absence be proved by Oath, to the Satisfaction of the Judge) such Fine, not exceeding 5*l.* nor less than 40*s.* as the Judge shall think reasonable. *Stat. 3 Geo. 2. c. 25. §. 13.*

In capital Cases. In Capital Cases the Sheriff returns the Panel of the Jury, who being called, and appearing, the Prisoners are told by the Clerk, that these good Men now called and appearing, are to pass on their Lives and Deaths; therefore if they will challenge any of them, they are to do it before they are sworn, and if no Challenge hinder, the Jury are commanded to look on the Prisoners, and then severally, twelve of them, neither more nor less, are sworn. *2 Hale H. P. C. 293.*

But if thirteen are by Mistake sworn, the swearing of the last by Mistake is void, and the other twelve shall serve; but if eleven are sworn by Mistake, no Verdict can be taken of the eleven; and if it be,
it

it is Error, and so in a Presentment; but if twelve be recorded sworn, no Averment lies that one was unsworn. Upon Not Guilty pleaded, twelve were sworn to try the Issue; after their Departure from the Bar, one of the twelve leaves his Companions, which being discovered to the Court, by Consent of all Parties, *B.* another of the Panel, was sworn in the Place of *A.* and afterwards *A.* returns to his Companions, which being made known to the Court, *A.* is called and examined why he departed; he answered, to drink; and being examined whether he had spoke with the Defendant, denied it upon Oath; whereupon *B.* was discharged from giving any Verdict, and the Verdict was taken of *A.* and the other eleven, and *A.* fined for his Contempt. 2 *Hale H. P. C.* 296.

Although there be twenty Prisoners at the Bar for several Felonies, and the Oath is general, to try between the King and the Prisoners at the Bar, yet the Jury is to inquire of no more than what they are particularly charged with; and therefore though twenty have pleaded and stand at the Bar when the Jury is sworn, yet the Court may stay any Number of the Prisoners, and so the Jury stand charged with no more than what are thus particularly charged upon them; and when they go from the Bar, and have brought in their Verdict touching these Particulars charged upon them, then if the same Jury pass upon the remaining Prisoners, yet they are to be called over again, the Prisoners reminded of their Challenges, and the

Jury sworn *de novo*, upon the Trial of the rest of the Prisoners. 2 *Hale's H. P. C.* 294.

An Exception was taken to a Judgment in an inferior Court, that it was twelve *probi electi, triati, jurati, &c.* without saying, *ad veritatem de praemissis dicend'*; and this was held to be Error; for they might be sworn in another Cause at the same Court, and the Difference was said to be betwixt a Jury in criminal and a Jury in civil Matters; for the Oath which the Jury take in criminal Matters, is, that they shall truly try, and true Deliverance make of the Prisoners at the Bar, &c. so the Court may charge them with as many Prisoners as they think fit; but in criminal Matters the Jury must be sworn a-new in every several Cause. *Mich. 29 Car. 2. C. B. Watson versus Goodman.*

Methods
of Trial.

We shall here describe some of the Methods of Trial by Juries, in criminal and civil Cases; and begin with that which is of the greatest Consequence, and that is for High Treason, which is generally in this Manner.

For High
Treason.

The Clerk of the Arraignment having bid the Keeper to set the Prisoners to the Bar, and that being done, bids the Crier repeat these Words, *viz. You good Men that are impanelled to try between our Sovereign Lord the King and the Prisoners at the Bar; answer to your Names, every one at the first Call, on Pain and Peril shall fall thereon.* Then having marked the Names of those who appeared,

ed, he bids the Crier call those who made Default, thus; *You of the Jury who were even now called, and made Default, answer to your Names, and save your Fines.* Then he marks the Names of them who appear'd, and acquaints the Court how many appeared in the whole: afterwards he calls over the Names of the King's Witnesses, whose Names are indorsed upon the Indictments against the Prisoners who are to be tried, in order to know whether they are ready; and asks the Court which Prisoner they intend shall be tried first: that Prisoner being set to the Bar, and the others taken away, is ask'd, whether he has had a copy of the Panel delivered to him two Days, or more, since; if he should deny it, some Witness for the King, who delivered the Copy of it to him, must prove the Delivery of it.

It is thought most expedient to try but one Prisoner at once, for if more should be tried together, every one having the Benefit of challenging thirty-five peremptorily, may challenge so many, and make such Confusion, as that out of all which appear on the Panel, there will not be twelve left to try the Prisoners, and so put off the Trial, till by a new Precept the Sheriff can get a new Jury.

Then the Clerk of the Arraignment says, *You A. B. now Prisoner at the Bar, these Men, which you shall hear called, are to pass between our Sovereign Lord the King and you, upon Trial of your Life and Death; if you will challenge them, or any*
of

of them, you must speak to them as they come to the Book to be sworn, before they are sworn.

If the Prisoner challenges any of the Jurors, they are not to be sworn, and the Clerk of the Arraignment marks their Names as challenged, until the Prisoner hath peremptorily challenged thirty-five, and no more.

The Clerk of the Arraignment bids the Crier call the first Jurymen of the Panel, and bids him look upon the Prisoner, and lay his right Hand upon the Book; and if the Prisoner does not challenge him, the Crier swears him thus:

Juror's
Oath.

You shall well and truly try, and true Deliverance make between our Sovereign Lord the King and the Prisoner at the Bar, whom you shall have in Charge, and a true Verdict give according to the Evidence.

So help you God.

In this Manner twelve are to be sworn, one by one, each looking at the Prisoner as the Foreman did.

After twelve are sworn, the Crier makes Proclamation thus: *If any one can inform my Lord the King's Justices, the King's Serjeants, or the King's Advocate, before this Inquest be taken between our Sovereign Lord the King and the Prisoner at the Bar, let them come forth and they shall be heard, for the Prisoner stands upon his Deliverance; and all others, who are bound by Recognizance to give Evidence against the Prisoner at the Bar,*

Bar, come forth and give Evidence, or else you forfeit your Recognizance.

Then the Clerk of the Arraignment says, Charge to *A. B. hold up your Hand; you of the the Jury.* *Jury, look upon the Prisoner and hearken to his Cause. He stands indicted in this County of Middlesex, by the Name of (reading all the Indictment) upon this Indictment he hath lately been arraigned, and thereunto hath pleaded Not Guilty; and for his Trial hath put himself upon God and the Country, which Country you are. Your Charge is to inquire whether he be guilty of this High Treason, in Manner and Form as he stands indicted, or Not Guilty; if you find him guilty you shall inquire what Goods or Chattels, Lands or Tenements he had at the Time of the said High Treason committed, or at any Time since. If you find him Not Guilty, you shall inquire whether he fled for it; if you find that he did fly for it, you shall inquire of his Goods and Chattels, as if you had found him Guilty. If you find him Not Guilty, and that he did not fly for it, say so, and no more, and hear your Evidence.*

The King's Counsel having opened the Cause and spoke to it, the Clerk of the Arraignment calls the Witnesses indorsed on the Back of the Indictment, and bids them lay their Hands upon the Book, and the Crier administers the Oath to them, thus:

The Evidence which you and every of *Witnesses*
you shall give to the Court and Jury now *Oath.*
sworn,

Methods of Trial.

sworn, for our Sovereign Lord the King, against the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth. So help you God.

After each Witness against the Prisoner hath been examined, the Prisoner may ask him any Questions.

The Oath administred to the Prisoner's Witnesses is this:

The Evidence which you and every of you shall give on the Behalf of the Prisoner at the Bar, shall be the Truth, the whole Truth, and nothing but the Truth.

So help you God.

The Prosecutors first examine the Witnesses produced against the Prisoner, and the Prisoner cross-examines them; and so the Prisoner first examines his own Witnesses, and afterwards the Prosecutors cross-examine them; the Reply belongs to the Prosecutors.

When all the Evidence for and against the Prisoner, and the Prisoner himself and his Counsel have been heard, and the Chairman hath summed up the Evidence to the Jury, then the Clerk of the Arraignment bids the Crier swear a Bailiff to keep the Jury, thus:

Oath of the Bailiff *You shall well and truly keep this Jury without Meat, Drink, Fire or Candle; appointed [if it be in the Night-time, the Word to keep Candle is to be omitted] you shall not suffer the Jury. for any Person to speak unto them, nor you yourself,*

yourself, unless it be to ask them, whether they are agreed of their Verdict, until they shall be agreed of their Verdict.

So help you God.

The Bailiff is to take them to some convenient Room, to be provided for that Purpose, and lock them in and attend at the Door, until they let him know they are agreed, and then let them out, and bring them into open Court, to give their Verdict when the Court is sitting; for no Verdict in Cases of Treason, or Misprision of Treason, can be given in private, before any of the Justices out of Court.

When the Jury are come into Court, the Clerk of the Arraignment bids them answer to their Names, and having called over their Names, and heard them severally answer, he asks them if they are agreed of their Verdict? if they say *Yes*, he asks them who shall say for them? the Jury must answer and say, *The Foreman*; then the Clerk of the Arraignment, having bid the Keeper set the Prisoner to the Bar, says, *A. B. hold up your Hand. You of the Jury look upon the Prisoner; how say you, is A. B. guilty of the High Treason of which he stands indicted, or not guilty?* If the Jury say *Guilty*; then he says, *What Goods or Chattels, Lands or Tenements had he at the Time of the said High Treason committed, or at any Time since, to your Knowledge?* Jury, *None*. Clerk of Arraignment, *Hearken to your Verdict as the Court hath recorded it; You say that A. B.*
is

is guilty of the High Treason whereof he stands indicted; and you say he had no Goods or Chattels, Lands or Tenements, at the Time of the said High Treason committed, or at any Time since, to your Knowledge; and thus you say all. If the Jury say, Not Guilty. Clerk of Arraignment, Did he fly for it? Jury, Not that we know of. Clerk of the Arraignment, Gentlemen of the Jury, hearken to your Verdict, as the Court hath recorded it: You say A. B. is not guilty of High Treason whereof he stands indicted; and that he did not fly for it, and so you say all.

Proceedings when a Woman convicted of a capital Crime pleads Pregnancy.

When a Woman is indicted and convicted of High Treason (or any capital Offence, for which she is to suffer Death) and hath had Judgment given against her, then the Clerk of the Arraignment calls for the Woman to be set to the Bar, and asks her what she can say for herself in stay of Execution of her, according to the Judgment given against her? and if she says that she is great with Child, and prays a Jury of Matrons or motherly Women, to inspect and try whether she be great with Child or not, it is to be granted; and the Court commands the Sheriff of the County immediately to cause to come twelve good and motherly Women, by whom the Woman's Plea of Pregnancy may be tried, and who are not of Kindred to her, to handle and inspect her Body and secret Parts, because the Prisoner puts herself upon that Jury. And when the Jury of Matrons aforesaid, and a Panel of their Names are brought by the Sheriff into Court

Court, the Clerk of the Arraignment is to call them of the Panel, and swear twelve of them thus: A. M. lay your right Hand upon the Book, look upon the Prisoner, and hearken to your Oath.

Crier. *You shall diligently inquire, search Oath of and try, whether E. L. now Prisoner at the Jury of the Bar, be with quick Child or not, and Matrons. thereof give a true Verdict, according to the best of your Skill and Knowledge.*

So help you God.

After twelve are sworn, the Clerk of the Arraignment names the twelve sworn, and bids the Crier count them, and then bids him swear a Bailiff to keep the Jury of Matrons, thus:

Crier. *You shall well and truly keep this Oath of Jury of Matrons without Meat, Drink, the Bailiff Fire or Candle; [if in the Night, the to keep Word Candle is to be omitted] You shall the Jury of not suffer any Person but the Prisoner to Matrons. speak unto them, nor you yourself, unless it be to ask them whether they are agreed of their Verdict, until they shall be agreed of their Verdict. So help you God.*

And then the Bailiff is to take the Jury of Matrons to some convenient private Room, and the Gaoler is to take the Prisoner to them to be inspected by them; and the Matrons having duly searched and inspected the Prisoner, and conferred thereof together, and agreed to give their Verdict; as well the Prisoner as the Jury of Matrons

Methods of Trial.

Matrons must be brought again into Court. Clerk of Arraighs. *You good Women of the Jury of Matrons, answer to your Names.* And then having called them over, and they having answered; Clerk of Arraighs. *Are you agreed of your Verdict?* Jury of Matrons. *Yes.* Clerk of Arraighs. *Who shall say for you?* Jury. *The Forewoman.* Clerk of Arraighs. *Keeper, set E. L. to the Bar.* E. L. *hold up your Hand.* *You of the Jury of Matrons, look upon the Prisoner: How say you, is E. L. with quick Child or not?* If the Forewoman answer and say, *She is with quick Child.* Clerk of Arraighs. *You of the Jury of Matrons, answer to your Verdict as the Court hath recorded it: You say that E. L. is pregnant with quick Child, and so you say all.* Thereupon the Court (for the Reverence of God, and lest the Child should suffer for the Crime of the Mother) doth order the said E. L. to be recommitted to the Gaol, there to remain in safe Custody of the Sheriff, until, &c. But if the Forewoman of the Matrons answer and say, that the Prisoner is not with quick Child; then the Clerk of the Arraighs says, *You of the Jury of Matrons, hearken to your Verdict as the Court hath recorded it: You say that E. L. is not with quick Child, and so you say all.*

Of stand-
ing mute.

If any Person indicted of High Treason, when he or she shall be thereupon arraigned, do stand mute, or will not plead effectually, and directly to the Fact, then that is a Conviction. And the Person so standing mute, or not pleading, as afore-
said,

said, shall not have the Judgment of *Paine fort & Dure*, but shall have Judgment as a Traitor convict.

But if the Court find any Reason to doubt of the Sanity of the Person so standing mute, before he or she have Judgment, it must be tried by a Jury, whether he or she stand mute fraudulently, wilfully and obstinately, or by the Providence and Act of God.

And then the Court must command the Sheriff to return a Jury on a Panel, to try that Matter.

And twelve Jurymen named in that Panel must be sworn; and Witneses must be produced and sworn to prove the Matter against the Prisoner.

You shall diligently inquire, and true Oath of Presentment make, for and on Behalf of the Jury to our Sovereign Lord the King, whether try one A. B. the now Prisoner at the Bar, being standing now here indicted of High Treason, stands mute, fraudulently, wilfully and obstinately, or by the Providence and Act of God, according to your Evidence and Knowledge.

So help you God.

At *Nisi Prius* between Party and Par. Trial at
ty, the Trial is generally in this Man- *Nisi Prius*
ner. between
Party and
Party.

When a Cause comes on to be tried, the Cryer calls the Jury thus, *You good Men summoned to appear here this Day, between A. B. Plaintiff, and C. D. Defendant, answer to your Names and save your Issues.* Then the Clerk of the *Nisi Prius*

Prius or the Judges associate draws out of the box a Paper containing the Name, &c. of one of the Jurors, and he being called and answering to his Name, and not being challenged, this Oath is administered to him, *viz.*

Juror's
Oath.

You shall well and truly try this Issue between the Parties, and a true Verdict give, according to the Evidence.

So help you God.

And twelve being drawn and sworn in the same Manner, and called by their Names over again, and counted, the Counsel for the Parties open and shew to the Court and the Jury the Nature of the Complaint on the one Side, and of the Defence on the other, the Plaintiff's Counsel beginning first, and producing his Witnesses, unless the Issue lies on the Defendant's Side, as having admitted the Plaintiff's Declaration to be true, but having pleaded some Matter to avoid it, and then the Defendant's Counsel call their Witnesses first. The Oath administered to the Witnesses is this:

Witnesses
Oath.

The Evidence which you shall give to the Court and Jury sworn touching the Matters in Question, shall be the Truth, the whole Truth, and nothing but the Truth.

So help you God.

After the Witnesses examined, the Plaintiff's Counsel replies, if the Defendant examined any Witnesses: otherwise not; the Judge sums up the Evidence to the Jury, and

and then they withdraw to consider of their Verdict; unless it be a very clear Case, and then they generally give their Verdict immediately.

Three Jurors, in the Beginning of the Panel, were not returned by the Negligence of the Sheriff, and four after them were sworn, and then by Advice the Sheriff put in the three, of whom one appears; yet because they were past the three, who were left out, they go on with the Panel to eleven, and there were no more after the Name of that Juror in the Panel who appeared, and therefore they began *de novo* from the Head of the Panel, and that Juror was sworn. 37 H. 6. 12. b.

If a Panel be of two Counties, when Of swear: one of one County is sworn, another of the other County shall be sworn, and so of two interchangeably, till the twelve are sworn. Counties.

4 H. 4. 1. 11 H. 4. 63. So if one Panel be returned by the Bailiff of a Franchise, and another Panel by the Sheriff, there shall be one sworn of the Franchise, and then one of the Guildable, and so on, &c. 7 H. 6. 40.

In a Trial *per Medietatem Linguae*, the On Trial Denizens and Aliens ought to be sworn alternately, beginning with a Denizen. *Cro. tatem Linguae.* Eliz. 818.

If the Inquest be sworn, and, because Jury per- the Roll of the Entry is not in Court, the Jury be suffered to go at large till another go at large Day, they shall be sworn again. 7 H. 4. after sworn 39. Bro. Inquest 15. A Man brings several *Formedons* against one Man, of several *Moieties*, as Heir to several An- gain.

cestors

Of Withdrawing a Juror.

cestors upon one Gift, and the Issue for both was upon the Gift, and the Jury was chosen, tried and sworn upon the one, and at another time demanded upon the other Issue, chosen, tried and sworn. 21 E. 4. 25. A. was indicted of High Treason and arraigned upon it, and some of the Jurors sworn; and because there was not a full Jury, they were adjourned to another Day; at that Day a full Jury appeared, they who were sworn before were sworn again. *Jenk.* 110. *pl.* 10. The Jurors shall be sworn as they stand in the Panel, without having any Regard to those that were sworn before. *Tel.* 23.

A Jew had his Trial *per Medietatem Linguae, viz. Judaeorum*, and they were sworn on the five Books of *Moses*, held in their Arms, and by the Name of the God of *Israel*, who is merciful. *Dyer* 144. *pl.* 59. Marg. cites 9 E. 1.

Of withdrawing a Juror.

In what
Cases.

IT is held by the Opinion of some, that in criminal Cases not capital, after a Jury impanelled and sworn, and all the Evidence given, the King's Counsel may, without the Party's Consent, withdraw a Juror, and have the Cause tried over again. 1 *Vent.* 28. *T. Raym.* 84.

But herein the better Opinion seems to be; First, in capital Cases, a Juror cannot be withdrawn, though all Parties should consent to it. Secondly, That in criminal
Cases

Cases not capital a Juror may be withdrawn, if both Parties Consent, but not otherwise. Thirdly, That in civil Causes a Juror cannot be withdrawn, but by Consent of all Parties. *Cartb.* 465. *Cro. Car.* 484.

A Juror was sworn, and heard Part of the Evidence, and then fell sick, and then another was sworn by the Consent of the Plaintiff and Defendant, and the sick Juror was withdrawn. *Palm.* 411.

It has been held, that a Juror withdrawn from the Panel by Consent of both Parties, to the Intent the Trial for that Time may go off for Default of Jurors, in Order for the Jury to have a View, may be of the Jury when the Cause comes to be tried at a subsequent Time, and that this being neither a principal Cause of Challenge unto the favour, cannot be Error. *Trin.* 3 *Geo.* 1. *B. R.* *Huet* versus *Bainard*, *Ca. Law and Eq.* 390. And in this Case was cited a Case in *Cro. Eliz.* 430. (where Jurors being challenged, the Jury remained for Default of Jurors; and afterwards a new *Distringas*, with a *Nisi Prius*, was awarded against the same Jurors who were withdrawn before, and some of them who were withdrawn appeared and tried the Issue. All the Justices held clearly, that it was a Mis-trial, and not aided by any of the Statutes of Jeofails; whereupon a *Venire Facias de novo* was awarded to have a new Trial.) But to this it was answered, that that Case differed vastly from this, for that was the Case of Persons challenged as not in-
different,

Whether
a Juror
with-
drawn
may be af-
terwards
on that
Jury.

different, and that Challenge allowed of by the Court, which amounts to a Kind of Judgment; and therefore as long as it stood, though the Cause, upon which that Challenge was founded, ceased, the Person was incapable to try the Cause; whereas here the Juror is withdrawn from the Panel by Consent of both Parties, for no other Reason but that the Cause may go off, for Default of Jurors; and therefore a Person so withdrawn, is to be considered as if he had never been returned, and consequently no more unfit to try the Cause than any other. *Ca. Law and Eq.* 390, 391.

How the Jurors are to be kept, and demean themselves, and what Matters in respect thereof, will set aside their Verdict.

WHEN the Jurors depart from the Bar, a Bailiff ought to be sworn to keep them together, and not to suffer any to speak to them as well in civil as criminal Cases. 2 *Hale's H. P. C.* 296. *Palm.* 380. But it is not always done in civil Cases.

Jury to be kept without Meat, Drink, Fire or Candle, or Discourse with any one, till agreed on their Verdict. By the Law of *England*, a Jury after the Evidence given upon the Issue, ought to be kept together in some convenient Place, without Meat or Drink, Fire or Candle, or without Conversation with any one but the Officer who has the keeping of

of them, and with him only when they are agreed on their Verdict. 1 Inst. 227. b.

In an inferior Court, if the Jury will not agree on their Verdict, the Way is, as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree, and the Steward may from Time to Time adjourn the Court till such Agreement. 1 Salk. 201. Farel. 1.

But by the Consent of the Justices they may eat and drink; as if any of the Jurors be taken very ill, he may be allowed with Meat, and Drink, or any thing else that is requisite, and so may his Companions at their own Costs, or the indifferent Costs of the Parties, if they so agree, by the Assent of the Justices, may both eat and drink. Doct. & Stud. Dial. 2. c. 52. 19 H. 7. 3. Bro. Jurors 51. Verdict 102. Postea 172.

If the Jury after the Evidence given to them at the Bar, do at their own Charge eat or drink, either before or after they be agreed on their Verdict, it is fineable; but it shall not avoid the Verdict. Where the Jury, for eating or drinking, before they have given in their Verdict, are fineable.

If the Jury before they are agreed on their Verdict eat and drink at the Charge of the Plaintiff, and afterwards find for him, it is a void Verdict; but if they find for the Defendant, the Verdict is good; and so on the other Hand, if they eat or drink at the Charge of the Defendant, and find a Verdict for the Plaintiff. Where it shall avoid the Verdict.

Of Keeping the Jury.

If after they are agreed on their Verdict, they eat or drink at the Charge of him for whom they found the Verdict, it shall not avoid the Verdict. *Vide M. 22 R. 2. Fitzh. Jury 177. 1 Inst. 227. b. 29 H. 7. 3. Jenk. 167. 24 E. 3. 24. 11 H. 4. 61. 20 H. 6. 24. 35 H. 6. 14 H. 7. 1, 30. Bro. Juror 2, 9, 11, 12, 13, 41, 51. Dyer 78. pl. 41. 218. pl. 4. Mod. 33, 599, 12. Mod. 111. 2 Salk. 645. Vaugh. 21. 2 Hale's H. P. C. 306. 2 Hawk. P. C. 146. 1 Vent. 124. Freem. 79.*

Motion in Arrest of Judgment, because the Jury had taken Meat and Drink before their Verdict given, which is certified on the *Postea*, but not examined at whose Charge, which the Court said would make a great Difference; for if it were at the Cost of the Party for whom they gave their Verdict, it will make the Verdict void; but if it were at their own Costs, it is only fineable, and the Verdict good. *Hil. 1 Jac. 1. B. R. Harebottle versus Placock, Cro. Jac. 21.*

The Jurors being gone from the Bar to consider of their Verdict, some of them had Apples and Figs, whereof the Court taking Notice, when they came to give their Verdict, examined them upon their Oaths, and they who had eaten were fined five Pounds, and committed to the *Fleet*. Some of the Justices doubted if the Verdict was good, and upon many Precedents had, it was adjudged good, and the Judgment affirmed upon a Writ of Error. *Owen 38. 12 H. 8. Ro. 102. 28 H. 7. 3. 13 H. 4. 13.*

The

The Jury being withdrawn after Evidence, and remaining a long Time without concluding on their Verdict, the Officers, who attended them, seeing their Delay, searched them, and found that some had Figs and others had Pippins; which being moved to the Court, they were examined on Oath, and two of them confessed that they had eaten Figs before they were agreed on their Verdict, and three confessed that they had Pippins, but had not eat any of them; and that this was unknown to the Parties. Those who had eaten were each of them fined five Pounds, and those who had not eaten the Pippins, were each of them fined forty Shillings; but the Verdict was, upon great Consideration, and Conference with the other Judges, held to be good. *Hil. 30 Eliz. C. B. Mounson versus West. 1 Leon. 132. pl. 181. And. 183. pl. 219. Moor 431. pl. 604. Cro. Eliz. 480. pl. 14. Poph. 110. pl. 7. Golds. 92. Godb. 353.*

A Box of preserved Barberries, Sugar-candy and Licorish, being found upon John Mucklow, one of the Jurors, after he and the other Jurors were gone from the Bar to consider of their Verdict, he was committed to the Fleet until he paid a Fine to the Queen. *Hil. 20 Eliz. C. B. Welcken versus Elkington, Plowd. 519. b. Lev. 132. Goldsb. 29. Godb. 353.*

After a privy Verdict, the Jury may eat and drink, and the next Day either affirm or alter their Verdict in open Court. after a privy Verdict.

When the Court will by Consent of the Parties give leave for a Juror to have Meat and Drink.

The Court may give the Jury leave to drink at the Bar, after the Evidence is given to them, and before the Verdict, if the Plaintiff and Defendant will consent to it. *Pasch. 23. B. R.* But they may not drink out of the Court. A Juror had leave to drink at the Bar, after a long Evidence given in a very hot Day, in *Easter Term* aforesaid, by the Consent of the Plaintiff and Defendant. *Style's Pract. Reg. 288.* The Court may give the Jury leave to eat some small Matter, and to drink at the Bar, after some Evidence is given to them, if the Plaintiff and Defendant will consent to it. But they may not eat or drink out of Court, nor have Fire or Candle. 2 *Lilly's Pract. Reg. 25. Antea 169.*

A Motion was made that a Verdict given on a Trial at Bar might be set aside upon an Affidavit of these Misdemeanors of the Jury, viz. *That they had Bottles of Wine brought them before they had given their Verdict, which were put in a Bill, together with Wine and other Things, which were eat and drank by the Servants of the Jury, and the Tipstoffs that attended them at the Tavern where they were consulting upon their Verdict. That this Bill (after the Verdict given) was paid by the Plaintiff's Solicitor; and that after they had given up their privy Verdict, they were treated at the Tavern by the Plaintiff's Solicitor, before their Affirmance of it in Court.* The Court was of Opinion that the Verdict should stand.

They

They agreed, that if the Jury eat or If the Jury drank at the Charge of the Party, for eat and whom they find their Verdict, it disan- drink at nuls their Verdict; but here it does not the Charge appear that the Wine they drank was had of the Par- by the Order of the Plaintiff, or any A- ty for gent for him. 'Tis true, in regard his whom Solicitor paid for it afterwards, it induces they find, a Presumption that he bespoke it; but if it disan- nuls the the Verdict should be quashed for this Verdict. Cause, it must be entered upon the Roll, that it was for drinking at the Plaintiff's Charge, and it is not proved that this Wine was provided by him.

That as to their receiving a treat from Where re- the Plaintiff, after their privy Verdict ceiving a given, and before it was given up in Court, Treat it shall not avoid the Verdict. But if the from one Defendant had treated them, and they of the Par- had changed their Verdict, as they might ties, after a have done in Court, it should then have privy Ver- been void. If after the Jury be agreed dict, and on their Verdict (which the Chief Ju- before it is stice said must be intended such an Agree- given in ment as hath the Signature of the Court Court, put upon it, viz. a privy Verdict) they shall make the Ver- eat and drink at the Charge of him for dict void. whom they do pass it, it shall not avoid the Verdict; and if it should, the Court said, most Verdicts given at the Assizes would be void; for there it is usual for the Jury to receive a Collation after their privy Verdict given, from him for whom they find. But such Practice ought not to be, and if any of the Parties, their Attornies or Solicitors speak any Thing to the Jury, before they are agreed, relating to the Cause,

How Jurors to demean themselves

viz. that it is a clear Cause, or I hope you will find for such a one, or the like, and they find accordingly, it shall avoid the Verdict; but if Words of Salutation, or the like pass between them, (as was endeavoured to be proved in this Case) they shall not. Also if after they depart from the Bar, any Matter of Evidence be given them, as Depositions or the like, though the Jury swear they never looked on them; yet that shall quash their Verdict. They said there was a

Misdemeanor in the Jury, for which they ought to be fined; and that the Jury. Plaintiff's Solicitor had carried himself with much Blame and Indiscretion; and the two Tipstiffs, who attended the Jury, for that they were not more careful, but connived at these Matters, were fined. Easter 23 Car. 2. B. R. The Duke of Richmond against Wife, 1 Vent. 124. Freem. Rep. 79.

Jurors cast
Lots for
the Ver-
dict.

A Verdict set aside upon Affidavits that the Jury had cast Lots for it. Mich. 1675. B. R. Rex versus Fitzwalter. 2 Lev. 139. Freem. 414. pl. 549. Mich. 1677. B. R. Foster versus Hawden. 2 Lev. 205. Mich. 1677. Fry versus Hardy. 2 Jones 83. Hil. 8 G. 2. C. B. Par versus Soames. The like by the Opinion of three Judges, Fortescue dubitante, Pasch. 9 G. 2. C. B. Philips versus Fowler. Comyns 525. Hil. 10 G. 2. C. B. Langdel versus Sutton. Vide Comb. 14. 1 Keb. 811. and Sir Philip Alton's Case.

Jurors

Jurors for receiving Breviats from the Jurors re-
Plaintiff, punishable. *Bradshaw* versus receiving
Salmon, Hob. 114. Paper
from the Parties punishable.

The Jurors had a Writing from the A Wri-
Plaintiff, which was not delivered to them ting deli-
in the Court, and found a Verdict for the vered by
Plaintiff, which Matter being discovered the Plain-
to the Court, it was held that the Plain- tiff to the
tiff could not have Judgment. 11 H. 4. Jury, vi-
16. *Bro. Juror 8. M. 3 Mar. 1.* tiates the
Verdict
found for him.

In an Action of Waste, the Plaintiff No Wri-
would have delivered to the Jury a Pa- ting to be
per of the Names of the Places in which delivered
the Waste was done; but the Court said to the Ju-
it could not be done, but by the Assent ry, with-
of both Parties. 9 H. 6. 66. *Bro. Ju- out the
ror 1.* Consent of
the Court.

If the Plaintiff, after Evidence given, Where a-
and the Jury departed from the Bar, or ny Wri-
any one for him, deliver any Letter from tings, &c.
the Plaintiff to any of the Jury, concern- not given
ing the Matter in Issue, or any Evidence in Evi-
or Writing touching the Matter in Issue, dence, be
which was not given in Evidence, it shall delivered
make void the Verdict, if found for the to the Ju-
Plaintiff, but not if it be found for the ry, it shall
Defendant; and so on the other Hand, if make the
the Letter, Evidence or Writing be de- Verdict
void.
delivered by the Defendant, and the Verdict
be found for the Defendant, it is void; but
not if found for the Plaintiff. If the Jury
carry away any Writing unsealed, which

was not given in Evidence in open Court, it shall not avoid the Verdict, though they should not have carried it with them.

1 *Inst.* 227. *b.* 2 *Roll. Abr.* 714, 715. *Styl.* 383. 12 *Mod.* 520. 11 *H.* 4. 16, 17, 18. 34 *H.* 6. 25. 9 *H.* 6. 66. *Moor* 451. *Cro. Eliz.* 411.

Jury's
tending
for and
examining
a Witness
after they
are gone
from the
Bar, viti-
ates the
Verdict.

A Jury after their Departure from the Bar, may come back to propose a Question to the Court, or to have a Witness examined again; but that must be in open Court, and therefore in a civil Case, where the Jury being gone from the Bar to confer on their Verdict, one of the Witnesses that was sworn on the Part of the Defendant, was called by the Jury, and he recited again his Evidence to them, after which they gave their Verdict for the Defendant. Complaint being made to the Judge of Assise of this Misdemeanor, he examined the Jury, who confessed all the Matter, and that the Evidence was the same in Effect as was given before, and not different; this Matter being returned upon the *Postea*, the Court was of Opinion that the Verdict was not good, and set it aside. *Trin.* 32 *Eliz.* *B. R. Metcalfe* versus *Deane.* *Cro. Eliz.* 189. 2 *Roll. Abr.* 715. *p.* 13. *Moor* 452. 1 *Leon.* 305. 2 *Hale's H. P. C.* 307.

A Book Upon a Trial to prove the Nonage of that had the Plaintiff, Church Books were given been given in Evidence, whereof the one was delivered to the Jury in Court, by Consent of the Parties, and afterwards the other was delivered to the Jury after they were gone from the Bar.

delivered

delivered to the Jury out of Court by the Solicitor of the Plaintiff, without the Assent of the Court, and a Verdict was found for the Plaintiff; this Matter being indorsed upon the *Postea*, the Question was, whether this Verdict was void; and the Court was divided in their Opinion; but afterwards Judgment was given for the Plaintiff. *Mich. 37 & 38 Eliz. Vicary versus Farthing, Cro. Eliz. 411. Moor 451. 2 Roll. Abr. 715. p. 11.*

It was assigned for Error in Fact, on a After the Judgment, that the Jury being gone to Jury are together to consider of their Verdict, one of retired to them shewed to the other a Writing for consider of the Plaintiff, which was not given in E- their Ver- vidence by the Parties, whereby they dict, one found a Verdict for the Plaintiff. Upon of them Demurrer, it was resolved by the Court shews to that it was not any Error, nor could be al- the others- ledged for Error, for it does not appear a Writing touching that it was Evidence given to the Jury the Mat- by any of the Parties, or by any other on ters in Behalf of the Plaintiff. But it shall be Question. intended that he shewed it of himself, and that it was a Piece of Evidence which he had about him before, and shewed it to inform himself and his Fellows, and as he might declare it as a Witness, that he knew it to be true; so he might shew any thing which he knew. *Mich. 40 & 41 Eliz. B. R. Graves versus Short, Cro. Eliz. 616. 3 D. A. 76. p. 3.*

If after the Jury depart from the Bar, Matter of Evidence any Matter of Evidence be given them, given to a Jury after they are departed from the Bar, shall quash the Verdict.

as Depositions or the like, though the Jury swear they never look'd on them, yet that shall quash the Verdict. *1 Vent. 125.*

In Ejectment after Evidence given, and just as the Jury were going from the Bar, the Solicitor for the Plaintiff privately gave one of the Jury some Depositions taken in *Chancery*, which had been read in Court a little before; upon this, when the Jury returned, and had agreed to find for the Plaintiff, this Matter was moved, and the Jury were examined, whether more was read to them after they went from the Bar, than before in open Court; and they answered that there was not: another Question was, how they were inclined to find before the Depositions were read to them; they answered, some were for the Plaintiff and others for the Defendant. Whereupon the Solicitor was committed, and the Verdict ordered to be taken *de bene esse*, and the whole Matter to be recorded after the Verdict. *Palm. 325. 2 Rol. Rep. 261.* If they found against him on whose Part the Copies were delivered, the Verdict is good; otherwise not. *2 Hale's H. P. C. 308.*

The Jury being charged with an Issue concerning a Copyhold, after they were gone from the Bar, one of them went from the rest, and returned with a Court-Roll, and told them he knew how the Matter was, and that it was for the Plaintiff, upon which the other, who before were of another Opinion, left the Matter to him, and accordingly there was a Verdict for the
the

the Plaintiff. For this Misdemeanor a new Trial was granted. 1 *Sid.* 235. 1 *Keb.* 824. *pl.* 115.

In an Information for Extortion, the Jury took with them out of Court, an Order of the Common Council of the City of *London*, relating to Stalls in *Newgate Market*, without Leave of the Court or Consent of the Parties. *Holt*, Chief Justice, said, this was irregular; but the Matter of the Order being Evidence for both Sides, it would not set aside the Verdict. But where the Jury took with them a Map of the Premises out of Court, which was only Evidence for one Side, and found accordingly, the Verdict was set aside. 1 *Ld. Raym.* 148. 2 *Salk.* 645.

If either Party say to the Jury after they Words by are gone from the Bar, you are a weak either Par- Man, it is as clear of my Side as the Nose ty to the in a Man's Face. This is a new Evidence, Jury. for this Affirmation may much persuade the Jury; and if found for him shall set aside the Verdict. 2 *Roll. Abr.* 716. *pl.* 20. If before Agreement any of the Parties, their Attornies or Solicitors, say it is a clear Case, or I hope you will find for such a one, or the like, and they find accordingly, it shall avoid the Verdict. But if Words of Salutation pass between them, it shall not. 1 *Vent.* 125. If the Party, after the Jury sworn, speak with a Jury- man, but nothing touching the Business in Issue, this does not avoid the Verdict given afterwards for him. 2 *Hale's H. P. C.* 308.

Of giving
Money to
a Juror.

If either Party give Money to the Jury, and they find a Verdict for him, it is void; but if they find a Verdict against him, it is good. 14 H. 7. 29. *Bro. Verdict* 19. It was moved in Arrest of Judgment, that the Plaintiff's Solicitor, after the Charge given, and before the Verdict, gave Money to some of the Jurors; and this being proved by the Oath of two Witnesses, the Verdict was set aside by two Judges; *Wray contra.* 1 *Leon.* 18. But the Plaintiff and Defendant may (by Agreement) give Money equally, to the Jury, to defray their Charges, where the Trial is put off, they by that Means being forced to stay longer in Town than they expected; for by doing this the Jury cannot be intended to be made more favourable to the one Party than the other; so likewise they may do where there is a View, and also give them a Treat at equal Charges. *Lill. P. R.* 49. *Tit. Agreement.*

If there be eleven agreed, and but one dissenting, who says he will rather die in Prison; yet the Verdict shall not be taken of the eleven, nor the Refuser fined or imprisoned; and therefore where such a Verdict was taken by eleven, and the twelfth fined and imprisoned, it was, upon good Advice, ruled that the Verdict was void, and that the twelfth Man should be delivered, and a new *Venire Facias* awarded; for Men are not to be forced to give their Verdict against their Judgment. 2 *Hale's H. P. C.* 297.

If the Jury say they are agreed, the Court may examine them by the Polls, and if in Truth they are not agreed, they are fineable. 2 *Hale's P. C.* 299.

It seems to have been antiently an uncontroverted Rule, and hath been allowed, even by those of the contrary Opinion, to have been the general Tradition of the Law, that a Jury sworn and charged in a capital Case, cannot be discharged (without the Prisoner's Consent) till they have given a Verdict; and notwithstanding some authorities to the contrary, in the Reign of King *Charles* the Second, this hath been holden for clear Law, both in the Reign of King *James* the Second, and since the Revolution. 2 *Hale's H. P. C.* 294, 195. 2 *Hawk. P. C.* 439.

In Cases of Life and Member, if the Jury cannot agree before the Judges depart, they are to be carried in Carts after them, so they may give their Verdict out of the County. 1 *Vent.* 79. But it is made a *Quaere*, whether in such Case the Sessions may be adjourned before the Verdict taken. 2 *Hale's H. P. C.* 297.

In Case of Life and Member, if the Jury cannot agree, they are to be carried after the Judges in Carts.

Whether

Whether a Jury may take any Reward or Recompence for their Time and Trouble.

IN civil Causes Jurors are to be paid for their Trouble and Attendance. *Carth.* 242. But if they take any thing for giving their Verdict, at Common Law they are punishable by Fine and Imprisonment; and by the Statute 38 E. 3. c. 12. they may be prosecuted on a *Decies tantum*, either at the Suit of the King or of the Party, or any Stranger, and if convicted, shall forfeit ten times as much as they have taken.

In *Trials per Pais* 62, 216, it is said, that in Strictness on a Trial at *Nisi Prius* in the same County, they are only intitled to eight Pence, and on a Trial at Bar, when they come out of a foreign County, to five Pounds: And by a Rule of the Court of King's Bench, *Mick.* 1654. §. 19. for the Remedy of excessive Charges, especially whilst the Jury lieth out, it is ordered that a Jury lying out one Night after a privy Verdict delivered, there be allowed for the whole Diet of each Jurymen that Night, no more than three Shillings and four Pence a-piece, and for two Tipstaffs and one Crier, or Usher, to each of them no more than two Shillings ordinary, besides the Charges of the Jurors Lodging.

On

On a Motion for a new Trial, because the Plaintiff, after the Trial, had paid the Jury four Pounds a Man, whereas the Rule of Court is, that they coming but out of *Hertfordshire*, should have but twenty Shillings a Man. *Moreton* and *Rainsford* thought the Breach of the Rules of Court ought to be punished, but did not think fit to set aside the Verdict for it. *Twisden* said a new Trial ought to be granted, and that it was fit to be made an Example to other Juries; for if the Parties may give what they will, it is to be presumed, the Ability of one or other will much incline the Jury to find for him, from whom they may expect the greatest Reward. *Keeling* was for a new Trial; but the Court being divided, the Plaintiff had Judgment.
1 Vent. 30.

I take it to be customary at this Time in civil Cases at *Nisi Prius*, to give a common Jury twelve Pence a Man, and to give special Juries one Guinea each, on a Trial at Bar; and more, according to the Distance of the County the Jury come from, and to the best of my Remembrance, some few Years since, a Jury out of *Lancashire* were allowed fifteen Guineas a Man.

When a Trial has gone off for Default of the Jurors (a sufficient Number of them not attending) it has been held that they who appeared were not to be paid, because no body was the better for their Attendance. 2 Lil. P. R. 125. A Cause being appointed to be tried at the Bar of the Court.

Of Paying the Jury.

Court of King's Bench, by a Jury out of *Wiltshire*, after the Jury were summoned the Parties agreed the Matter; but the Summonses not being countermanded, the Jury appeared; whereupon it was ordered, on Motion, that the Attornies on both Sides should pay them. 2 *Show.* 248. *Lev.* 18, 174.

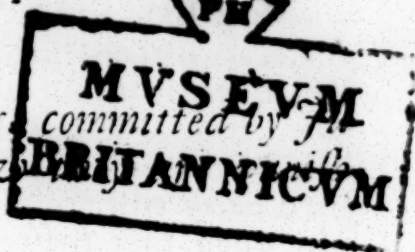
The Plaintiff and Defendant may, by Agreement between them, give Money equally to the Jury, to defray their Charges, where the Trial is put off, they by that Means being forced to stay longer in Town than they expected; for by doing this the Jury cannot be intended to be more favourable to one Party than the other. So likewise they may do, where there is a View; and also give them a Treat at equal Charges. *Mich.* 1649. *B. S. Lill. P. R.* 49. *Tit. Agreement.*

Where a Juror is withdrawn, both Parties ought to pay the Costs equally; but on a Nonsuit, the Plaintiff pays all the Costs. *Comb.* 75.

A Day being appointed for a Trial at Bar by a *Dorsetshire* Jury, the Sheriff, by the Order of the Plaintiff, countermanded all the Jurymen, against the Will of the Defendant, who prayed a Trial, which was now impossible; for the Court in such Case will not supply the Jury with a *Tales de Circumstantibus*, but offered to Nonsuit the Plaintiff on Record; and directed that the Defendant should contribute to satisfy the Jurors, who appeared, to the Intent that they should continue to be indifferent between the Parties, and referred it

it to the Secondary to examine and tax
Costs for the Defendant, in Satisfaction of
his Trouble and Expence. 2

Of Misdemeanor committed by Furors, and boz
able.



THE greatest Crime a Jury can be False Ver-
guilty of, is that of giving a false dict.
Verdict; and for that they are punishable
by Attaint, in which the Law gives this
heavy Judgment.

First, That they shall lose *liberam* The Pu-
legem for ever, that is, that they shall nishment.
be so infamous, that they shall never be
received as a Witness, or be of any Jury.

Secondly, That they shall forfeit all
their Goods and Chattels.

Thirdly, That their Lands and Tene-
ments shall be taken into the King's
Hands.

Fourthly, That their Wives and Chil-
dren shall be thrust out of Doors.

Fifthly, That their Houses shall be rased
and thrown down.

Sixthly, That their Trees shall be root-
ed up.

Seventhly, That their Meadows shall be
plowed up.

And *Eighthly*, That their Bodies shall
be cast into Prison; and the Party re-
stored to all that he lost by Reason of the
unjust Verdict. 1 Inst. 294. b.

Although

Although this Method of punishing Jurors, through the Severity of it, and the Practice of granting new Trials, where a Jury find a Verdict against Evidence, has been but seldom used of late Years, yet it is still in Force. By the Statute 25 H. 8. c. 3. the Severity of this Punishment is mitigated, in Case the injured Party will ground his Action of Attaint upon that Statute; but if he brings the Attaint according to the Course of Common Law, and the Petit Jury are convicted, this Judgment shall be given.

This Prosecution, from the Difficulty of attainting the Jury, and the Severity of the Punishment, has been seldom used of late; and the Practice of granting new Trials, where the Jury find against Evidence, and the Direction of the Court, has been introduced in the room of it.

The Jury may be attainted either *First*, For finding contrary to the Evidence: Or *Secondly*, For finding out of the Compass of the issue. As to the first, it is not easy to convict them, because they may have Evidence from their own Knowledge of the Matter, or they may have Reason to distrust the Evidence, and where the Evidence of a Witness is false in an immaterial Part, the Jury need not give him any Credit in any other Part, *Cro. Eliz.* 310. or they may know him to be a Person not to be credited; but if a Juror has Knowledge of the Matter, that would be proper to be given in Evidence; the fairest way would be for him to acquaint the Court with it, before he is sworn on the Jury.

Jury. 1 *Salk.* 405. But it is easier to convict the Jury for finding out of the Compass of the Issue, because it is manifest, that what is so found is on Evidence not corresponding to the Issue. 1 *Roll. Abr.* 282.

And therefore it is necessary that the Matters in Issue should be set forth with all convenient Certainty, that it may be seen how far, and when the Jury are mistaken; as in Trespass, the Quantity and Value of the Thing demanded must be so certainly described, that if the Jury find Damages beyond such Quantity and Value, it may be apparently excessive, and they subject to an Attaint; and so on special Contracts, they must be set forth so particularly, that if Evidence be given of another Contract, and not of that in the Issue, and yet the Jury find for the Plaintiff, they may be subject to an Attaint.

The Trial in an Attaint shall be by twenty-four Jurors; and all Manner of Evidence shall be allowed to be given in Support of the first Verdict; but against it none but what was given before; because it is to be presumed, that if such new Evidence had been on the former Trial, the Petit Jury would have given a different Verdict.

And the Jury might give their Verdict, not only on the Evidence given in Court, but on their own Knowledge; and therefore whatever otherwise they came to the Knowledge of, they may give in Evidence for the Support of their Verdict; but then the Plaintiff in the Attaint may
answer

answer thereto, and disprove it as well as he can; but he cannot give other Evidence, nor inforce the first Evidence with more Matter than was given and disclosed before. *Dyer* 212. *pl.* 34. 1 *Roll. Abr.* 285. *Bro. Attaint* 87. *Dyer* 53. *pl.* 14. *Dyer* 369. *Godb.* 271. *Hob.* 227.

In what Cases, and for whom Attaint lies, is a long and intricate Piece of Learning, and as Attaints are now much out of Use, it is not very necessary to be inserted in this Treatise; nevertheless for the Satisfaction of some, I shall mention some few Things on that Head.

In what
Cases an
Attaint
lies.

An Attaint lies only in civil Actions, and not in criminal Prosecutions; and Sergeant *Hawkins* says, the Reason of the Difference is that in the first Case a Man's Property only is brought in Question a second Time, and not his Liberty or Life: Also, it may be generally presumed that a Jury is likely to be equally influenced with the Fear of an Attaint from either of the contending Parties, whereas if any such Examinations of their Proceedings were allowed in criminal Causes, they might be often in great Danger of one Side, by incurring the Resentment of a powerful Prosecutor, and provoking him to call their Conduct in Question for their supposed Partiality; but they would have little to fear from an injured Criminal, who would seldom be in Circumstances to make his Prosecution formidable. 1 *Harek. P. C.* 191. But *Hale*, Chief Justice, says, the King may have an Attaint; for although a Man convicted upon an Indictment can have

have no Attaint, because the Guilt is affirmed by two Inquests, that of the Grand Jury, who found the Indictment, and accused him on their Oaths, and that of the Petit Jury, who agree with them; yet when the Petit Jury acquit the Defendant, their Verdict is single, and disaffirms what a Grand Jury of twelve Men have upon their Oaths presented. 2 *Hale's H. P. C.* 310.

When the Suit is in the King's Name solely, and a Verdict is found for the King, no Attaint lies; but it does, where another sues jointly with the King, in an Action *Qui tam, &c.* 4 *Leon.* 46. *Cro. El.* 309.

An Attaint does not lie on an Inquest of Office, that is, a Matter not found in a Court of Record, on an Issue there joined, but only found before the Sheriff, in order to inform the Court of some Particulars, without the Knowledge whereof they cannot proceed. 1 *Inst.* 355. 10 *Co.* 119. 11 *Co.* 6. a. 1 *Roll. Abr.* 280.

Therefore, if a Recovery be had in a *Quare Impedit*, by Default, and a Writ issues to the Sheriff to inquire of the Damages and Plenarty, no Attaint lies upon this Inquest; for it is but an Inquest of Office. Wherefore if the Matter omitted to be inquired by the principal Jury, be such as goes to the very Point of the Issue, and upon which, if it be found by the Jury, an Attaint will lie against them by the Party, if they have given a false Verdict; there such Matter cannot be supplied by a Writ of Inquiry,

quiry, because thereby the Plaintiff may lose his Action of Attaint, which will not lie upon an Inquest of Office. *Carth. 362.* But if the Inquiry be by the same Inquest that tried the Issue in the *Quare Impedit*, an Attaint lies. *1 Roll. Abr. 280. 10 Co. 119.*

No Attaint lies upon a Verdict given by twenty-four Jurors, nor does it lie upon a Verdict given in an Attaint for the thing of which the Jury is attainted; but if they find any collateral Matter *besides* the Attaint, it does lie, and they may be attainted. *1 Inst. 335. a. 1 Roll. Abr. 280. 2 Roll. Abr. 280.*

An Attaint lies before Execution sued out, for the Danger of the Death of any of the Petit Jury; for after the Death of any of the Petit Jury, no Attaint lies. *1 Roll. Abr. 282.*

An Attaint lies for giving excessive or too little Damages; but not if the Court abridge or increase the Damages, or the Party releases Part of the Damages, so that what remains are reasonable. *9 H. 6. 2. 1 Roll. Abr. 284.*

By the Stat. 23 H. 8. c. 3. all Attaints must be taken in the King's Bench or Common Pleas, and not elsewhere: but a *Nisi Prius* may be granted; and therefore no Conusance of Pleas can be granted in Attaints. *1 Inst. 294. b.*

Juror punishable for not appearing, or withdrawing himself before Verdict. If a Juror refuses to appear, or after he has appeared, withdraws himself before he is sworn, or refuses to be sworn, he may be fined; if after the Jury are sworn and

and put together, to consider of their Verdict; one of them secretly withdraws himself, and goes away, he may be fined and imprisoned. 36 H. 6. 27. 30 E. 3. 3. 30 E. 3. 42. 34 E. 3. 4 E. 4. 36. Bro. Jurors 18, 25, 26, 33, 46. Enquest 42. 8 Co. 38. b. 41. a. 2 Hale's H. P. C. 309. Vide 14 H. 7. 30. Bro. Juror 13.

And by the Statute 3 Geo. 2. c. 25. §. 13. every Person whose Name shall be drawn, and who shall not appear, being called three Times, on Oath made that such Person had been duly summoned, shall forfeit for every Default (unless some reasonable Cause of Absence be proved by Oath, to the Satisfaction of the Judge) such Fine, not exceeding five Pounds, nor less than forty Shillings, as the Judge shall think reasonable.

If the Jury, after they are sworn, refuse to give any Verdict at all, they are punishable. Noy 49. 3 Bulst. 173. Vaugh. give a Verdict. 152. If they will not agree, the Justices may fine them, Dr. & Stud. Dial. 2. c. 52. or they may be carried after the Justices in Carts, till they do agree. 41 Aff. 11. Bro. Juror 29, 51, 53, 21. 1 Vent. 97.

The Jury were sent from the Bar to Jurors punish- consider of their Verdict, but, it being nishable late on a Saturday Night, they separated for separa- and went every one to his own House, ting before without giving a privy Verdict, or so much they have as consulting upon the Evidence; but af- given their Verdict. terwards gave a Verdict according to the Direction of the Court; for this Misdemeanor they were fined each forty Shillings, and a new Trial granted. The Chief

Chief Justice said, that by such Trial each Party might be prejudiced; for the Jurors going at large, without consulting together, may forget the Evidence; and it is the Right of the King's Subjects, to have the Matter determined when the Evidence is fresh in the Memory of the Jurors; and the suffering Jurors to go to their Houses, is only by Connivance; for by the strict Rules of Law it ought not be suffered. *Pasch. 1675. B. R. Anonymous.*

At *Northampton Assizes*, the Jury retired in the Forenoon to consider of their Verdict; at the Sitting in the Afternoon the Judge, being informed that two or three of the Jurors were in Court, asked them what they did there; they said they could not agree, whereupon they were sent back to their Companions, and afterwards found a Verdict for the Plaintiff. The Court of Common Pleas were of Opinion that this was a Misdemeanor in the Jury, for which they were fineable, though not a sufficient Cause to set aside the Verdict, for the Plaintiff was not in Fault. *Mich. 9 Geo. 2. C. B. Lord St. John against Abbot.*

Or giving In a Writ of Conspiracy, eleven of the
their Ver- Jurors gave their Verdict without the Af-
dict before sent of the twelfth: the Foreman was one
they are of the Indictors; the Court declared they
all agreed. would set a great Fine upon him, and com-
mitted him to the *Marshalsea*; the other
ten were fined each half a Mark, for
giving their Verdict before they were a-
greed

greed. 40 E. 3. 10. Bro. Cball. 142. Juror 28. Dyer 78. p. 41.

In an Appeal of Murder, the Jury going from the Bar, notwithstanding the Evidence was full against the Defendant, eight of them agreed to find him not guilty, but the others would find him guilty: the next Morning, two of the four agreed with the eight; afterwards the other two consented in this Manner, that they should bring in and offer their Verdict Not guilty; but if the Court disliked that, then they should change their Verdict, and find him Guilty: Upon this they came to the Bar, and the Foreman pronounced the Verdict Not guilty; the Court misliking the Verdict, as being contrary to their Direction, examined every one of the Jurors by the Poll, whether that was their Verdict; ten of the first Part of the Panel severally affirmed the Verdict, but the two last discovered the whole Affair; whereupon being sent back, they returned and found the Defendant Guilty. For this the Foreman was fined one hundred Marks, the other seven, who agreed with him at first, forty Pounds a piece; the other two who agreed with the eight, although they affirmed that it was because they could not endure or hold out any longer, yet for that they did not discover the Practice, being examined by the Poll, but affirmed the Verdict, were fined twenty Pounds a piece, and all of them imprisoned. The other two were dismissed, yet blamed for such a Manner of consenting, in A-

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bute

Jurors
casting
Lots for
the Ver-
dict.

buse of the Court. *Mich.* 42 *Eliz.* *B. R.* *Wats* versus *Brains.* *Cro. Eliz.* 778. *Noy* 171. 2 *Inst.* 557. 1 *D. A.* 793. *p.* 1, 2. *Roll. Ab.* 596. *p.* 6. *Co. Ent.* 59. 2 *Hale's H. P. C.* 309. 1 *Hawk. P. C.* 146.

On Affidavits that the Jury had determined their Verdict by casting Lots, they were ordered to attend the next Term, to be fined, and the Verdict was set aside. *Mich.* 1677. *B. R.* *Foster* versus *Hawden.* 2 *Lev.* 205. *Hill.* 1675. *B. R. Rex* versus *Fitzwalter.* 2 *Lev.* 139. *Freem.* 414. *pl.* 549.

On Affidavit that the Jury gave their Verdict by the tossing up of a Sixpence, the Verdict was set aside, and the Jury, who were of the County of *Northumberland*, were ordered to attend the next Term. *Mich* 1677. *Fry* versus *Hordy,* 2 *Jones* 83.

On an Affidavit that three of the Jurymen had declared that the Jurors differing in Opinion about their Verdict, agreed to determine it by hussling Halfpence in a Hat, and that the Chance falling in Favour of the Defendant, they gave their Verdict accordingly: the Court ordered that Judgment should be stayed, and that the three Jurymen who made the Declaration, should attend; afterwards one of the Jurymen attended, but had made no Affidavit in Answer to the Charge against him; the Court said he could not be examined *viva voce*, and therefore made a Rule for him to shew Cause why an Attachment should not issue against him. *Hill.* 8 *Geo.* 2. *C. B.* *Par* versus *Seames.*

A Verdict was set aside for the same Reason by the Opinion of three Judges, *Fortescue dubitante*. Pasch. 9 Geo. 2. C. B. *Philips versus Fowler*, Comyns 525.

One of the Jurymen had discovered upon Oath, that the Jurors had determined their Verdict by hussling Halfpence in a Hat, the eleven remaining Jurymen had denied it on Oath, but it was proved that four of them had confessed it; whereupon an Attachment was awarded against them. It was moved that Proceedings on the Attachment might be stayed on Payment of Costs to both Parties, without the Attendance of the Jurors in Court, who lived in *Yorkshire*. Court: Let all the Jurors attend to be publickly admonished, that the Country may take Warning. *Hil. 10 Geo. 2. C. B. Langdel versus Sutton*. Vide *Comb. 14. 1 Keb. 811. and Sir Philip Aston's Case*.

If after the Evidence given upon a Trial the Jury either eat or drink, before they are agreed on their Verdict, they are fineable. *1 Inst. 227. b.* The Court being informed that some of the Jurors who were gone from the Bar to consider of their Verdict, had Apples and Figs, examined them upon their Oaths, and fined and committed them who had eaten. *Owen 38. 12 H. 8. ro. 102. 20 H. 7. 3. 13 H. 4. 13.* A Jurymen was fined and committed till he paid the Fine, for that a Box of Sweet-meats was found upon him, after he and his Companions were gone from the Bar to consider of their Verdict. *Hil. 20 Eliz. C. B. Welden ver-*

fus Elkington, *Plowd.* 519. *b.* *Ley* 132. *Goldsb.* 92. *Godb.* 353. held to be a great Misdemeanor, and fineable. *Easter* 23 *Car.* 2. *B. R.* *The Duke of Richmond* against *Wise.* 1 *Vent.* 124. *Freem. Rep.* 79. *Cro. Jac.* 21.

May eat
or drink
by Leave
of the
Court.

But by Consent of the Justices they may eat or drink; as if any of the Jurors be taken very ill, he may be allowed Meat and Drink, or any thing else that is requisite; and his Companions, at their own Costs, or the indifferent Costs of the Parties, if they so agree, by the Assent of the Justices, may both eat and drink. *Doct. & Stud. Dial.* 2. *c.* 52. The Court may give the Jury leave to drink at the Bar, after the Evidence is given to them, and before the Verdict, if the Plaintiff and Defendant will consent to it. *Easter* 23 *Car.* 2. *B. R.* But they may not drink out of the Court. A Juror had Leave to drink at the Bar, after a long Evidence given, in a very hot Day in *Easter* Term, by the Consent of the Plaintiff and Defendant. *Style's Pract. Reg.* 288. The Court may give the Jury Leave to eat some small Matter, and to drink at the Bar, after some Evidence is given to them, if the Plaintiff and Defendant will consent to it; but they may not eat or drink out of Court, nor have Fire or Candle. 2 *Lilly Pract. Reg.* 25.

After a privy Verdict, the Jury may eat and drink, and the next Day either affirm or alter their Verdict in open Court. 1 *Iust.* 227. *b.*

Jurors were held to be punishable for receiving Breviats from the Plaintiff. *Bradshaw versus Salmon, Hob. 114.*

As to punishing a Jury in their judicial Capacity, it has been fully considered in *Bushe's Case*, which follows; and it is there settled, and has been since agreed to, that a Jury is not punishable, except by Attaint, for finding a Verdict contrary to the Direction of the Judge, or what may seem to others clear and manifest Evidence; and *Hale* in his 2 *H. P. C.* 160, 161, 211. is of the same Opinion, though he seems to admit that the long Use of fining Jurors in the King's Bench in criminal Cases, may possibly give a Jurisdiction to fine in those Cases; yet it can by no Means be extended to other Courts as Gaol Delivery, *Oyer and Terminer, &c.* And by some, if it plainly appears, that the Jurors are perfectly satisfied of the Truth of a Fact, as if the Judge asks them if they find the Matter to be as such a Witness has deposed, and they say they do, and then the Judge tells them the Fact being so found, the Law is for the Plaintiff, if, notwithstanding this, they find for the Defendant, in such a Case they may be fined, unless an Attaint lies against them; for otherwise, they could not be punishable for so palpable a Partiality. 2 *Hawk. P. C.* 148. 2 *Jones* 15, 16. *Vaugh.* 144, 145. *Kel.* 50.

Some make a Question, whether a Jury is not fineable for refusing to answer Questions of a Judge, touching their Opinion of any particular Fact. 2 *Hawk. P. C.* 149.

fus *Elkington*, *Plowd.* 519. *b.* *Ley* 132. *Goldsb.* 92. *Godb.* 353. held to be a great Misdemeanor, and fineable. *Easter* 23 *Car.* 2. *B. R.* *The Duke of Richmond* against *Wise.* 1 *Vent.* 124. *Freem. Rep.* 79. *Cro. Jac.* 21.

May eat
or drink
by Leave
of the
Court.

But by Consent of the Justices they may eat or drink; as if any of the Jurors be taken very ill, he may be allowed Meat and Drink, or any thing else that is requisite; and his Companions, at their own Costs, or the indifferent Costs of the Parties, if they so agree, by the Assent of the Justices, may both eat and drink. *Doct. & Stud. Dial.* 2. *c.* 52. The Court may give the Jury leave to drink at the Bar, after the Evidence is given to them, and before the Verdict, if the Plaintiff and Defendant will consent to it. *Easter* 23 *Car.* 2. *B. R.* But they may not drink out of the Court. A Juror had Leave to drink at the Bar, after a long Evidence given, in a very hot Day in *Easter* Term, by the Consent of the Plaintiff and Defendant. *Style's Pract. Reg.* 288. The Court may give the Jury Leave to eat some small Matter, and to drink at the Bar, after some Evidence is given to them, if the Plaintiff and Defendant will consent to it; but they may not eat or drink out of Court, nor have Fire or Candle. 2 *Lilly Pract. Reg.* 25.

After a privy Verdict, the Jury may eat and drink, and the next Day either affirm or alter their Verdict in open Court. 1 *Inst.* 227. *b.*

Jurors were held to be punishable for receiving Breviats from the Plaintiff. *Bradshaw versus Salmon*, *Hob.* 114.

As to punishing a Jury in their judicial Capacity, it has been fully considered in *Bussel's Case*, which follows; and it is there settled, and has been since agreed to, that a Jury is not punishable, except by Attaint, for finding a Verdict contrary to the Direction of the Judge, or what may seem to others clear and manifest Evidence; and *Hale* in his 2 *H. P. C.* 160, 161, 211. is of the same Opinion, though he seems to admit that the long Use of fining Jurors in the King's Bench in criminal Cases, may possibly give a Jurisdiction to fine in those Cases; yet it can by no Means be extended to other Courts as Gaol Delivery, *Oyer and Terminer*, &c. And by some, if it plainly appears, that the Jurors are perfectly satisfied of the Truth of a Fact, as if the Judge asks them if they find the Matter to be as such a Witness has deposed, and they say they do, and then the Judge tells them the Fact being so found, the Law is for the Plaintiff, if, notwithstanding this, they find for the Defendant, in such a Case they may be fined, unless an Attaint lies against them; for otherwise, they could not be punishable for so palpable a Partiality. 2 *Hawk. P. C.* 148. 2 *Jones* 15, 16. *Vaugh.* 144, 145. *Kel.* 50.

Some make a Question, whether a Jury is not fineable for refusing to answer Questions of a Judge, touching their Opinion of any particular Fact. 2 *Hawk. P. C.* 149.

K 3

But

Of Misdemeanors in Furors.

But I cannot think they are bound to answer, from the Danger that might ensue by Attaint, or otherwise.

31 August, 22 Car. 2. A Fine of forty Marks was set by the Court of Sessions at the *Old Baily*, upon *Edward Busbel* and eleven other Persons, and upon every of them, being the twelve Jurors sworn to try several Issues between the King and *William Pen* and *William Mead*, for unlawful Assemblies and Tumults, for that the said Jurors acquitted the Defendants, contrary to full Evidence and the Direction of the Court in Matter of Law; and the said *Edward Busbel* was committed to *Newgate* till he paid the said Fine; whereupon *Busbel* sued out a *Habeas Corpus*, returnable in the Court of Common Pleas; and this Matter being returned by the Sheriffs of *London*, he was discharged.

On which Case that great Judge Sir *John Vaughan*, Ch. Just. of the Court of Common Pleas gave his Opinion to the Effect as follows;

It is common for Students, Baristers or Judges, to deduce contrary and opposite Conclusions out of the same Case in Law; and there is no Difference that two Men should infer distinct Conclusions from the same Testimony. What a Witness says, may in the Understanding of one Man prove one Thing, but in the Apprehension of another clearly the contrary.

If a Judge having heard the Evidence given in Court (for he knows no other) should tell the Jury, upon this Evidence, that the Law is for the Plaintiff, or for the

the

the Defendant, and they are under Pain of Fine and Imprisonment to find accordingly; if the Jury ought in Duty so to do, Trial by Jury would be but a troublesome Delay, of great Charge, and no Use in determining right and wrong, and had better be abolished than continued: For if the Judge, from the Evidence, shall upon his own Judgment first resolve what the Fact is, and so knowing the Fact, shall then resolve what the Law is, and order the Jury, under a Penalty, to find accordingly, it can be of no Use to continue Trials by Juries.

Without a Fact agreed, it is impossible for the Judge to know the Law relating to that Fact, or direct concerning it.

The Judge can never direct what the Law is in any Matter controverted, without first knowing the Fact.

The Judge, merely as Judge, cannot possibly know the Fact otherwise than from the Evidence, which the Jury have; but he can never know what Evidence the Jury have, and consequently cannot know the Matter of Fact, nor punish the Jury for going against their Evidence; for he cannot know what their Evidence was.

If the Jury were to have no other Evidence of the Fact than what is delivered in Court, the Judge would know their Evidence, and might know the Fact equally as well as they, and so direct what the Law is; but even then the Judge and Jury might honestly differ in the Result from the Evidence, as well as two Judges may, which often happens.

Of Misdemeanors in Jurors.

The Jury being returned of the Country or Neighbourhood, where the Cause of Action arose, the Law supposes them to have sufficient Knowledge to try the Matter in Issue.

They may have Evidence from their own personal Knowledge, by which they may be assured, and sometimes are, that what is deposed in Court is absolutely false; to this the Judge is a Stranger, he knows no more of the Fact than what he heard in Court, and perhaps from false Witnesses, and consequently knows nothing.

The Jury may know the Witnesses to be stigmatized and infamous, which may be unknown to the Parties, and consequently to the Court.

In many Cases it is necessary for the Information, that they have a View of the Place in question; to this Evidence the Judge is a stranger.

If the Jury follow the Direction of the Judge, the Verdict may be reversed by Attaint, and they punished for doing that which if they had not done, they should have been fined and imprisoned by the Judge; which is unreasonable.

If they do not follow the Direction of the Judge, and are therefore fined and imprisoned, yet they may be attainted, and so doubly punished by distinct Judicatures for the same offence; which the Common Law will not admit of.

To what End is the Jury to be returned out of the Neighbourhood where the Cause of Action arose? To what End must
Hundredors

Hundredors be of the Jury, whom the Law supposes to have nearer Knowledge of the Fact, than those of the Neighbourhood in general? To what are they challenged so scrupulously to the Array and Poll? To what End must they have such a certain Freehold, and be good and lawful Men, and not of Affinity to the Parties concerned? To what End must they in many Cases have the View for their better Information chiefly? To what End must they undergo the heavy Punishment of villanous Judgment upon an Attaint, if after all this, they must implicitly give a Verdict by the Dictates and Authority of another Man, under Pain of Fine and Imprisonment, when sworn to do it according to the best of their own Knowledge? .

A Man can no more infer or conclude a Thing to be resolved by another Man's Understanding or Reason, than he can see by another's Eye, or hear with another's Ear.

If the Jury give a right Verdict, yet if they are not assured it is so from their own Understanding, they are forsworn, at least in Conscience.

It is absurd to fine a Jury for finding against their Evidence, when the Judge knows but Part of it; for the better and greater Part of the Evidence may be wholly unknown to him.

The legal Verdict of the Jury to be recorded in finding for the Plaintiff or Defendant; what they answer, if asked Questions concerning some particular Fact, is not of their Verdict essentially, neither

Cf Embracery and Offences by

are they bound to agree in such Particulars; if they all agree to find their Verdict for the Plaintiff or Defendant, they may differ in their Motives, as well as Judges may differ in their Reasons for giving their Judgment for the Plaintiff or Defendant, which is common. *Mich. 22 Car. 2. C. B. Buskell's Case. Vaughan 135. 2 Jones 15. 1 Mod. 119. 3 Keb. 322.*

Of Embracery, and Offences committed by others, with Regard to Jurors.

Embrace-
ry.

ANY Attempt whatsoever, to corrupt or influence a Jury, or any way to incline them to be more favourable to the one Side than the other, by Money, Promises, Letters, Treats, or Persuasions, except only by the Strength of the Evidence, and the Arguments of Counsel in open Court, at the Trial of the Cause, is a proper Act of Embracery, whether the Jurors, on whom such Attempt is made, give any Verdict or not, or whether the Verdict given be true or false. *1 Hawk. P. C. c. 85. §. 1. F. N. B. 171. B. C. 1 Inst. 369. a. Moor 815. pl. 1104. 21 H. 6. 20. a. 22 H. 6. 5, b. 37 H. 6. 31. a Bro. Decies 10, 11, 13.*

The Law so far abhors all Corruption of this Statute, that it prohibits every Thing which has the least Tendency to it, what specious Pretence soever it may be covered with;

with; and therefore it will not suffer a mere stranger so much as to labour a Juror to appear, and act according to his Conscience. 1 *Hawk. P. C. c. 85. §. 2.* 13 *H. 4. 16. b.* *Moor* 806. *Cro. Eliz.* 816. 1 *Inst.* 159. *b.* 369. *a.*

It has been said, that generally the giving Money to a Juror after the Verdict, without any precedent Contract in Relation to it, is an Offence favouring of the Nature of Embracery. But it seems clear that the giving such a reasonable Recompence to Jurors as is usually allowed them for their Expences in travelling, &c. is no ways criminal. 1 *Hawk. P. C. c. 85. §. 3.* 39 *Aff.* 19. *Bro. Decies* 14.

It has been adjudged that the bare giving Money to another, to be distributed among Jurors, is an Offence of the Nature of Embracery, whether any of it be afterwards actually so distributed or not. 1 *Hawk. P. C. c. 85. §. 4.*

It is as criminal in a Juror, as in any other Person, to endeavour to prevail with his Companions to give a Verdict for one Side, by any Practices whatsoever, except only by the Arguments from the Evidence, which was produced, and Exhortations from the general Obligations of Conscience to give a true Verdict; and there can be no Doubt but that all fraudulent Contrivances whatsoever to secure a Verdict, are high Offences of this Nature; as where Persons by indirect means procure themselves or others, to be sworn on a *Tales*, in order to serve one Side. 1 *Hawk. P. C. c. 85. §. 4.* 17 *F. 4. 5. b.* 18 *E. 4. 4. b.*

Of Embracery and Offences by

4. *b. Bro. Maintenance* 32, 39. 1 *Saund.* 301.

Neither the Party himself, nor his Counsel, nor Attorney, nor any Person whatsoever, can justify any indirect Practices of influencing a Jury, either by giving or promising them Money, or menacing them, or instructing them in the Cause before-hand, &c. 1 *Hawk. P. C.* c. 85. §. 5. 13 *H. 4.* 16. *b.* 17. *a.* 11 *H.* 6. 11. *a.* 2 *Ro. Ab.* 116. *L.* 6. *M.* 3. 19 *H.* 6. 31. *b.* 13 *H.* 4. 17. *a.* 2 *Bulst.* 25. *Noy* 102. 1 *Inst.* 369. *a.* *Moor* 815. *pl.* 1104.

Any Person, who may justify any other Act of Maintenance, may safely labour a Juror to appear and give a Verdict according to his Conscience; but that no other Person can justify intermeddling so far, and no one whatsoever can justify the Labouring a Juror not to appear. 1 *Hawk. P. C.* c. 85. §. 6. *Dyer* 48. *pl.* 19. 1 *Inst.* 157. *b.* 369. *a.* *Moor* 813. *pl.* 1101. *Noy* 102. *Hob.* 294.

Offences of this Kind are restrained by the Common Law, and subject the Offender either to an Indictment or Action, they are also restrained by the several Statutes of 5 *E.* 3. c. 10. 34 *E.* 3. c. 8. and 38 *E.* 3. c. 12. *Vide Hawk. P. C.* c. 85. §. 8. to 22. *Trin.* 19 *E.* 3. *B. R.* *Rot.* 21.

Striking a
Juror.

Praesentatum fuit per juratam quod cum jurata capta fuit coram Domino Rege apud Westmonasterium die lunae, &c. inter Aliciam de Legh querentem et Willielmum Waugbrcain defendentem de placito trans-
gressum

gressionis quidam Richardus de Carlill & alii tempore, quo juratores inquisitionis fuerunt ad barram coram iusticiariis ad veredictum suum dicendum, dictis juratoribus minas fecerunt & ipsos persecuti fuerunt ad portam palatii Domini Regis Westmonasterii & ibidem insultum fecerunt & ipsos vulneraverunt & male tractaverunt, &c. Et dictus Richardus in curiam ductus dicit quod non est culpabilis & statim faletur praemissa & submittit gratiae curiae, iudicium redditur quod manum suam dextram amittat & amputetur & committitur Turri London, ibidem moraturus dum vixerit, sed executio pro amputatione manus respectuatur quousq; &c. Simile iudicium, Pasch. 24 E. 3. B. R. Rot. 56. 2 Ro. Ab. 76. 2, 3.

41 Aff. 25. A Man struck a Juror at Westminster, who passed against him, and was indicted and arraigned at the Suit of the King, and the Judgment was, that he should go to the Tower of London, and there remain in Prison all his Life, and that his right Hand should be cut off, and his land, &c. seized into the Hands of the King. 2 Ro. Ab. 76. pl. 3.

The Court of King's Bench granted an Information against a Town Clerk, for publishing an Order of the Court against Jurors, who had found a Person guilty of Manslaughter only, upon an Indictment of Murder, by which Order the said Jurors are declared to be justly suspected of Bribery. Hil. 10 Ann. Reginae versus Wakefield.

Evidence.

What
ought to
be given
in Evi-
dence.

IN Trespass for entering into the Plaintiff's Close in *Calvering*, in a certain Place caled *Calverfield*, abutting on the south Part, in the Possession of *J. S.* upon Not guilty pleaded, and Issue joined thereon, the Plaintiff ought to prove his Abutment, and he ought to prove all the Abutment; for it is not sufficient to prove the Mill to be of the south Part, but he ought also to prove that this at some Time or other was in the Tenure of *J. S.* *Norvell* versus *Sands*, 2 *Roll. Abr.* 677. p. 1, 2.

On an Indictment, for that the Defendant, with others, at the Parish of *St. Giles in the Fields*, riotously assembled and broke and entered a certain Chamber of one *Sarah S.* in the Mansion-House of one *Sarah James*, and took and carried away thirty yards of Stuff: Upon Evidence it appeared to be the Mansion-House of one *David Jameson*, and not *James*. The Chief Justice held, that this did not maintain the Indictment, like the above Case in *Roll.* for in the principal Case Part is local, Part not local; the Chamber is local, the taking and carrying away is not local; but then all is put together as one intire Fact, under one Description, and you cannot divide them. *The Queen* against *Cranage*, 1 *Salk.* 385.

In an Action upon the Case, for fraudulently selling a Horse to the Plaintiff, as the proper Horse of the Defendant, when in Truth it was the Horse of Sir *J. L.* because the Plaintiff could not prove that the Defendant knew it not to be his own Horse, (for the Declaration must be, that he did it fraudulently, or knowing it not to be his own Horse) the Defendant having bought the Horse in *Smithfield*, but not legally tolled, the Plaintiff was nonsuited. *Sprigwell versus Allen, Aleyn 91.*

In an Action upon the Case, for delivering unmerchandizable Goods, knowing them to be naught, the Knowledge need not be proved in Evidence; and though it cannot be proved in Evidence, that the Party knew the Goods were unmerchandizable, yet the Plaintiff shall have a Verdict; and so it has been ruled in a Demurrer upon Evidence. *Denison versus Ralphson, 1 Vent. 365, 366. Skin. 66.*

In an Action upon the Case, for the Profits of an Office, granted to the Plaintiff by Patent, which recited a former Patent to *A.* and the Surrender of that Patent: the Defendant, who claimed under a subsequent Patent, pleaded Not guilty. On the Trial, the Defendant insisting that as the Plaintiff's Patent recited the Patent to *A.* the Plaintiff must prove the Surrender of that Patent; the Court were of Opinion, that if the Defendant took Advantage of the Recital, he must admit all that was recited; but on the Defendant's producing the Patent to *A.* the Plaintiff was forced to prove the Surrender. *Moun-
tague*

ague versus *Preston*, 2 *Vent.* 170. *Vide* *Mead* and *Lenthal*, 2 *Rol. Abr.* 678. *B. p.* 2. *Cro. Car.* 587. 1 *Jones* 463.

If a Will whereby Lands are devised be proved in the Spiritual Court by Witnesses, yet the Probate of this Will, nor the Witnesses who were sworn to the Probate of it, are to be given in Evidence at the Common Law to prove the Will and the Devise of the Land, because this Probate as to the Land, which is a Matter of Freehold, was *coram non judice*, though the Probate was good as to the personal Estate devised by the same Will. *Nettar* versus *Bret*, 2 *Rol. Abr.* 678. *B. pl.* 1. 1 *Jones* 355. *Cro. Car.* 391, 395. *Style* 10.

None can be admitted to give Evidence of what was done at a former Trial, without producing the Record of the former Trial. 2 *Rol. Abr.* 679. *pl.* 3, 10. 680. *pl.* 11. 12 *Mod.* 555.

Testimony taken in a Court, which is not a Court of Record, as the Spiritual Court, tho' it be in a Cause whereof they had Cognizance, and tho' the Parties be dead, shall not be given in Evidence on an Action at Law. 2 *Rol. Abr.* 679. *p.* 5, 7, 8. *Litt. Rep.* 167. *March* 120. *pl.* 198. *Freem. Rep.* 84. *pl.* 103. *Hob.* 112. *Clayt.* 9. *pl.* 17.

But a Sentence in the Spiritual Court may be given in Evidence because it is a judicial Act. 2 *Rol. Ab.* 679. *pl.* 6. *Freem.* 84.

Depositions taken in a Suit between other Persons, shall not be given in Evidence

dence against him, who does not claim under any of the said Persons. *Hob. 112. pl 132.*

Depositions taken in a Cause where Tenant for Life only, was Party, cannot be made Use of as Evidence against the Reversioner or Remainder-man. Depositions taken in a Suit, where Tenant in Tail was Party, cannot be made Use of against the Issue of Tenant in Tail, because he comes in by a Title paramount *per formam domini*; and although Tenant in Tail has a Power over the Estate, and may dispose of it, yet if he in a Bond binds himself and his Heirs, the Issue in Tail is not bound; but if Tenant in Fee is Party to a Suit, the Depositions taken in such a Cause may be read against the Heir. *2 Freem. Rep. 264.*

In an Information exhibited for the King, by the Attorney General, if after Evidence has been given, and the Jury is ready to give their Verdict, the Attorney General will not proceed, but have a Juror withdrawn, and so no Verdict is given. On a new Information, none of the first Jury shall be admitted to give Evidence that the first Jury was agreed to give a Verdict against the King; because as it ought not to be discovered against the King in the first Information, by the same Reason it ought not to be discovered against him in this new Information; for if it should be, no Benefit would accrue to the King by his Prerogative to withdraw a Juror before Verdict. *Roberts versus*

lus Harcourt, 2 Rol. Ab. 679. pl. 10. V. ibid. 680. pl. 11.

If a Trespass be done on the fourth of May, and the Plaintiff alledges it to be done on the fifth of May, or on the first of May, when no Trespass was done; yet if upon Evidence it falls out that the Trespass was done before the Action brought, it is sufficient. *19 H. 6. 47. 5 E. 4. 21 E. 4. 66. 1 Inst. 283. a.*

If the Point of an Issue be a bare Agreement, or a simple Contract, without any complex Matter, and the Evidence proves it to be a special Agreement, it will be good. *Heath's Max. 85. Plowd. 8.*

In an Action for Words alledged to be spoken in the Presence of A. B. and others, it is sufficient to prove that they were spoken in the Presence of others only. *Trials per Pais 180. (390.)*

In an Action brought by a Man on a Promise alledged to be made to himself; if Evidence be given that it was made to his Wife, and that he agreed to it, it is sufficient. *Brown's Anal. 17.*

On the
General
Issue.

In an Action on the Case, founded upon an Injury done by the Defendant, to the Plaintiff's Damage, every Thing that shews that the Defendant did what he might lawfully do, may be given in Evidence on Not guilty pleaded; for that proves that he had done no Injury. *Per Holt C. J. Comyns Rep. 274.*

So upon *Non Assumpsit, Non Dimisit, or Non Detinet* being in Issue, every Thing may be given in Evidence, which disaffirms the Contract, for that goes to the
Gist

Gift of the Action; since if there be no Contract to be performed at the Commencement of the Action, there could be no Trespass for Non-performance of it; and therefore a Release goes to the Gift of this Action, for it shews there was no Contract at the Time the Action was commenced; for as in Trover he must have a Right to the Thing, so in *Assumpsit* he must have a Right to the Thing declared on; therefore every Thing that shews the Contract to be void, as Nonage, or more Money lent at Play than the Statute allows of, may be given in Evidence on the General Issue; for on a void Contract the Plaintiff has no Right to any; therefore this and the like goes to the Gift of the Action. *Note*, That the Gift of the Action is the Fraud and Delusion that the Defendant hath offered the Plaintiff, in not performing the Promise he had made, and by relying on which the Plaintiff is hurt; therefore what goes to shew that there was no Contract, or a void Contract, or that it was performed, or paid, or released, or that there was no Consideration, and discharged, goes to the Gift of the Action; because there could be no Delusion or Fraud to the Plaintiff at the Time of the Action brought, nor could he rely on that which had no Being; and therefore these Matters need not be pleaded, but may be given in Evidence on the General Issue. *Gilb. Hist. of C. B.* 53, 54. *1 Salk.* 280.

In Debt against Executors, who plead *Reins entre mains* to be administered, Issue being joined thereon, they may give in

in Evidence, that the Testator gave a Cap of Gold in pledge for 20 l. And the Executors with their own Goods redeemed the Pledge; by which the Pledge is their own Goods, and not the Goods of the Testator; for this Evidence is not contrary to the Issue, inasmuch as these Goods are not to be administred, though they were the Goods of the Testator; the Plea being that they had nothing to administer. 20 H. 7. 2. b. 4, 5. 21 E. 4. 22. 2 Ro. Ab. 684. p. 7. Kelw. 58. a. pl. 2. 61. b. pl. 2. Dyer 2. a. pl. 3, 4. Plowd. 186. 2 Rol. Abr. 676. p. 16. On *Plene Administravit* pleaded, an Executor may give in Evidence that the Testator was indebted to him in such a Sum of Money, and that he retained so much of the Testator's Goods to pay himself; for the Law changes the Property of so much of the Goods, so that they are not the goods of the Testator. 20 H. 7. 2. b. 4, 5. This being some Matter of Law, may be pleaded specially, and not left to a Jury. Hob. 127. But upon *Plene Administravit* pleaded, the Executor cannot give in Evidence a Recovery had against him by another; but he ought to plead the Recovery, and say further, that except for so much recovered, he has fully administred; for there though there be a Recovery, yet the Goods are the Goods of the Testator to be administred. 20 H. 7. 5. 2 Rol. Abr. 684. pl. 9.

Upon *Plene Administravit* pleaded, an Executor may give in Evidence Payment of Debts on Judgments, of his own proper

per Goods, and Retainer of so much of the Testator's in Lieu of it; for this alters the Property. 21 E. 4. 21. 20 H. 7. 5. 1 Inst. 283. a. Style 378.

When a Man cannot have Advantage of the special Matter, by way of pleading, he shall in the Evidence; the Rule of Law is, that a Man cannot justify the Killing or Death of another; and therefore in that Case he shall be received to give the special Matter in Evidence, as that it was *se defendendo*, or in Defence of his House, or in the Night, against Thieves or Robbers. 1 Inst. 283. a.

The King's Letter under his Sign Manual, certifying a Promise made in his presence, was received as Evidence in the Chancery. *Abygge versus Clifton*, Hob. 213.

It was said by the Court, upon the giving Evidence, that generally it shall be intended that a Deed was executed on that Day on which it bears Date, until the contrary be proved by Witnesses, or by other Circumstances urged to the Jury. *Mich. 1656. B. S. Mors and Ventris, M. S. Style 14. a.*

It shall be intended that a Deed was executed on the Day it bears Date, unless the contrary be proved.

An antient Possession going along with the Party and his Ancestors, and concurring with the Testimony of ancient Witnesses, is a strong Badge of a good Title in the Party. *Mich. 1656. B. S. Cooke and King, M. S. Style 14. b.*

Evidence of good Title.

If a Deed be burnt, &c. the Judge in such Case of extremity may admit Evidence of a Deed, as a Copy, &c. 10 Rep. 92.

A Copy of a Record shall be admitted to be given in Evidence, being testified to be a true Copy. 10 Rep. 92.

A Man outlawed upon an Indictment of Manslaughter in *Middlesex*, pleaded to reverse it, that he was beyond Sea, viz. at the Town of *Utrecht*, and offered in Evidence a Certificate under the Seal of that Town, that he was there at the Time the Outlawry was pronounced; the Court said, that it would not be admitted as Evidence, without some be sworn to the Truth of it, and to interpret it; but one swearing he knew him there all the Time, the Jury found for him, and he was immediately arraigned upon the Indictment. *Burgeffe's Case*, *Cro. Car.* 365.

Demurrer
to Evi-
dence.

If the Plaintiff gives in Evidence any Record or Sentence of the Spiritual Court, or Matter in Writing, and the Defendant demurs thereupon, the Plaintiff must join or waive the Evidence; because the Defendant shall not be compelled to leave a Matter of Law to lay Judges (*i. e.* a Jury); and there can be no Variance of a Matter in Writing. But if either Party offers to demur, upon Evidence given by a Witness, the other Party need not join unless he pleases; for the Credit of the Testimony is to be examined by the Jury, and such Evidence is uncertain, and may be enforced more or less. In the King's Case, the Party can't demur upon Evidence by Record, or Writing given for the King, unless the King's Counsel assent; but the Court will direct the Jury to find the

the Matter specially. *Middleton* versus *Baker*, *Cro. Eliz.* 751. 5 *Rep.* 104. *Dyer* 53.

A Demurrer being joined upon Evidence, and thereupon the Jury discharged, afterwards the Judgment of the Court being for the Plaintiff, Damages were assessed, and final Judgment was given. On a Writ of Error brought, it was insisted, that the Jurors who came to try the Issue, ought to have found Damages conditionally, or that in Case Judgment should be given for the Plaintiff; but the Court was of Opinion that the Damages might be assessed, either by the Jury conditionally, or on a Writ of Inquiry of Damages, after the Demurrer determined. *Darrose* versus *Newbort*, *Cro. Car.* 143.

Witnesses.

Oftentimes a Man may be challenged Who may to be of a Jury, that cannot be be a Witness. challenged to be a Witness; (for if a Juror be challenged, his Room may easily be supplied by others, but a Witness's cannot); and therefore, though the Witness be of the nearest Alliance, or Kindred, or of Counsel, or Tenant, or Servant to either Party; (or any other Exception that makes him not infamous, or to want Understanding or Discretion, or a Party in Interest) though it be proved true, shall not exclude the Witness to be sworn but he shall be sworn, and his Credit upon the Exceptions taken against him left to those of the

the Jury, who are Triers of the Fact.
1 *Inst.* 6. *b.*

Wife against the Husband, or Husband against the Wife.

It has been said, that a Wife cannot be produced either against or for her Husband, *quia sunt duae animae in una carne*, and it might be a Cause of implacable Discord and Dissention between the Husband and the Wife, and a Means of great Inconveniency, 1 *Inst.* 6. *b.* and Perjury. 2 *Rol. Abr.* 686. *H. p.* 4. It was resolved that in Case of a common Person between Party and Party, the Wife cannot be a Witness against her Husband; but between the King and the Party upon an Indictment she may, although it concerns the Wife herself. *Lord Audley's Case*, *Hunt.* 115, 116. But this Case has been denied; and it was held, that the Wife is to be a Witness against the Husband, and the Husband against the Wife, in no Case but Treason. *Grigg's Case*, *T. Raym.* 1. admitted by *Hale C. J.* in the Case of a Wife *de Jure*. *Brown's Case*, 1 *Vent.* 244. But in his *H. P. C.* 301. he says, that a Feme covert is not a lawful Witness against her Husband in Treason; yet in *Lord Castlehaven's Case*, upon an Indictment for a Rape upon his Lady by another, by her Husband's present Force, she was received as a Witness, by the Advice of the Judges who assisted at that Trial, and upon her Evidence he was convicted and executed. *Vide* 12 *Mod.* *The King* against *The Warden of the Fleet*, where *Holt C. J.* says, because it was a Rape upon her Person, she was received to give Evidence against her Husband. The Wife's Oath shall

shall be sufficient for her to have Security of the Peace against her Husband, as daily Experience shews.

If a Man be indicted of High Treason The King. or Felony, the King cannot by his Great Seal, or by Word of Mouth, give Evidence that he is guilty; for then he should give Evidence in his own Cause. *2 H. H. P. C. 282. F. N. B. 17. St. Glouc. c. 8. Abigney versus Clifton. 2 Rol. Abr. 686. p. 1. Hob. 213. pl. 271. Lea versus Lea. Godb. 199. pl. 285.*

If an Action be brought against two, and A Party. at the Assizes the Plaintiff proceeds only against one of them, the other may be a Witness in the Cause. *Godb. 418.*

If an Action of Battery by original be brought against two, or more, and one comes in upon the Exigent, there may be a new Original brought against the others, with a *Simul cum*, and they, who are waived, may be Witnesses in the Cause; but they, who are declared against with a *Simul cum*, cannot. *Per Rolls. Style 404.* If an Action of Trespass be brought against one with a *Simul cum* of others, and nothing is proved against the others, they may be examined as Witnesses in the Cause. *Style 401.*

A Counsellor or Attorney, though he Attorney may be a Witness and examined to some or Counsel. Purpose, yet not in such Matters whereof he hath been made Privy, as of Counsel or Attorney in the Cause, or which may disclose the Secrets of his Client's Cause. *Style 449.*

It seems an uncontested Rule in all Cases whatsoever, that it is a good Exception

tion against a Witness, that he is either to be a Gainer or Loser by the Event of the Cause, whether such Advantage be direct and immediate, or consequential only.

2 *Hawk. P. C.* 433. c. 46. §. 24.

Bail.

He, who is Bail for the Defendant, cannot be a Witness for him, without Consent.

2 *Hawk. P. C.* 433. c. 46. §. 24. *Calcham versus Spatman, Finch Rep.* 247.

Per Holt C. J. Where a Man makes himself a Party in Interest, after the Plaintiff or Defendant has an Interest in his Testimony, he shall not by this deprive the Plaintiff or Defendant of the Benefit of his Testimony. *Skin.* 586.

One who lays a Wager about the Cause. If a Man be a Witness of a Wager, and afterwards bets, this shall be no Reason to except against his being sworn to prove the Wager. *Barlow versus Vowel, Skin.* 586.

It being objected against one, who was produced as a Witness, that he had laid a Wager about the Merits of the Cause; it was said that a Witness cannot by any Act of his own, deprive the Party of his Evidence, but it influences his Testimony very much; whereupon he was examined upon a *Voire dire*, and denied that he got or lost, and then he was examined upon the principal Matter. *Comb.* 340. *Per Gould J.* Laying a Wager is no Hindrance to his being a Witness, for the Party has an Interest in his Testimony, which he cannot deprive him of. *George versus Pierce, 7 Mod.* 31.

Where a Man is interested in the Consequence of that which he swears for,
if

if it be so that the doing the Act which he is by his Evidence to invalidate or set, was a Means to obtain his Liberty, or an Exemption from corporal Punishment, he shall be a Witness; (as in the Case of Dureffs, though it be to set aside his own Bond) yet it being given to obtain his Liberty, he shall be a Witness. Also where the Nature of the Thing admits of no other Evidence; as if a Woman give a Note or Bond to a Man to procure her the Love of *J. S.* by some Spell or Charm, in an Indictment for the Cheat, though it tends to avoid the Note, yet she shall be a Witness. *Per Holt C. J. Regina versus Sewel al' Beans, 7 Mod. 119.*

In an Information upon the Statute of Criminal Usury the Party to the usurious Contract Suits.

shall not be admitted to be a Witness against the Usurer, for then in Effect he should be a Witness in his own proper Cause, and shall avoid his own Bonds and Assurances, and discharge himself of the Money he had borrowed; and though commonly he raises an Informer, yet in Truth he himself is the Party. *Trin. 8 Jac. Smith's Case, 2 Ro. Abr. 685. p. 2. 1 Inst. 6. b. 12 Co. 68. 2 Show. 490. Hard. 332. Lord Raym. 396. b.* After the Money paid, the Borrower may be a Witness; *per Twissden J. T. Raym. 191. 2 H. H. P. C. 280. 2 Hawk. P. C. 433. c. 46. §. 24.* The Party allowed to be a Witness *de bene esse*, by *Holt C. J. Far. 119.*

If three several Men depose in Chancery that *J. S.* made an Award, and upon

this the Party grieved brings three several Actions against them on the Statute 5 Eliz. c. 9. of Perjury, every one of them shall be a competent Witness for the other in the several Actions. *Pasch. 40 Eliz. B. Gunstone versus Dounes, 2 Rol. Abr. 685. p. 3. 2 H. H. P. C. 280.*

If *A. B.* and *C.* are severally indicted for Perjury, in proving a Bond, and *A.* traverses the Indictment, *B.* and *C.* though indicted for the same Offence, yet not being convicted, may be Witnesses for *A.* to prove the Execution of the Bond. *Pasch. 19 Car. 1 B. R. Bilmore, Gray and Harbin's Case, 2 H. H. P. C. 280.*

A. was indicted on the Statute of 5 Eliz. c. 9. for Perjury in Evidence given on an Action brought by *B.* against *C.* and in which a Verdict passed against *C.* upon this Evidence. It was held that *C.* who prosecuted the Indictment, could not be a Witness to prove *A.* guilty of the Perjury, because, being a Party grieved, he is, by the Statute, to recover by Action 20 l. and the Indictment is *ad grave damnum praediſt C. Mich. 1650. B. S. Bacon's Case, 2 Rol. Abr. 685. p. 4. Hard. 332. 1. Raym. 396. 2 Hawk. P. C. 433. c. 46. §. 24. 2 H. H. P. C. 281. 2 Show. 491.*

An Information was exhibited in the the Name of the Master of the Office, against the Defendants, for procuring one *D.* charged in *Marshalsea* for 3000 l. at the Suit of one *Linch*, to be discharged without special Bail, under Pretence and feigned Search, that there had been no Prosecution against him for three Terms.

On

On the Trial *Linch* was admitted to be a Witness, though the Information concluded *ad grave damnum praedicti* *Linch*; such Conclusion being only Matter of Course, and he neither a Gainer nor a Loser by it. *Hill. 1617. Car. 2. B. R. The King against Poney. 1 Sid. 237. 1 Keb. 710, 835, 843.*

On an Indictment for an Assault and Battery on *A. B.* he may be received as a Witness to prove the Defendant Guilty, because it is not at the Suit of *A. B.* but of *The King* and *A. B.* can reap no Benefit by the Conviction, for it shall not be Evidence in an Action brought for the same Assault and Battery. *2 Ro. Ab. 685. p. 5. Hard. 331. pl. 7. 2 H. H. P. C. 280.* And generally, any other Person to whose Damage a criminal Information concludes, is a good Witness to prove such Battery or other Misdemeanor, notwithstanding the Objection that he may have an Action. *2 Hawk. P. C. 433. c. 46. §. 24.*

Holt C. J. said, he was not satisfied that a Person interested could be a Witness in any Case, though it be a criminal Matter. *Rex versus Dean, Comb. 360.*

The Court seemed to think that the Informer himself cannot be a Witness, though it was objected that this would render Convictions impossible, unless Persons had Witnesses with them; for he is only nominal, and any Body's Name may be made Use of. *Regina versus Bradley, 10 Mod. 156.*

If it be proved that a Reward was promised to a Person for giving his Testimony,

L 3.

before

Of Witnesses.

before he gives it, it takes off his Testimony. 2 *H. H. P. C.* 280.

And Lord *Hale* says, that for his own Part he always thought, that if a Person have a Promise of a Pardon, if he give Evidence against one of his Confederates, it invalidates his Testimony, if proved upon him. 2 *H. H. P. C.* 280.

If a Tenant robs his Lord, or if a Lessee for Life robs him who has the Reversion, or if one resiant within a Franchise robs the Lord of the Franchise, who is intitled to the Goods of Felons, these may be Witnesses upon an Indictment or Trial of the Felon, notwithstanding the consequential Advantage that accrues to the Witness by the Attainder or Conviction of the Party, but the Credibility of their Testimony is to be left to the Jury. 2 *H. H. P. C.* 281.

But if *A.* has a Promise or Grant of the Goods of *B.* arrested for Felony, in case he be convicted, Lord *Hale* says, he should never allow *A.* to be a Witness to convict *B.* for he by his own Act after the Felony committed acquires the Interest, and so acts and swears for his own Advantage. 2 *H. H. P. C.* 281.

On an Information for Forgery of a Deed, purporting to be a Revocation of a Will, it was held, that no Legatee or other Person, who was or might be a Loser by the Deed, or who might receive any Benefit or Advantage by the Verdict's being found for the King, could be a Witness. *Wats's Case, Hard. 331. mes vide 12 Mod. 340. The King against The Warden of the Fleet,*

Fleet, and Lord Raym. 369. *Rex* versus *Whiting*.

A. B. having agreed to give her Son-in-law 5 *l.* but he by some Trick obtaining her Hand to a Note for 100 *l.* was indicted for the Cheat; and upon the Trial a Question was, whether *A. B.* might be a Witness; *Holt C. J.* she being in some Measure concerned in the Consequence of this Suit, it being some Means to discharge her of the 100 *l.* she shall not be admitted to give Evidence; for though the Verdict in this Information cannot be given in Evidence on a Trial upon the Note, yet doubtless they will mention it as a Motive to influence the Jury, which cannot well be prevented, though in Law it be no Evidence. *Rex* versus *Whiting*, 1 *L. Raym.* 396. 1 *Salk.* 283. *Hawk. P. C.* 433. c. 46. §. 24.

An Action upon an Agreement in Writing was brought in the Common Pleas, whereupon a Verdict was found for the Plaintiff, and 100 *l.* Damages given; an Information being afterwards exhibited for forging the Writing, the Defendant in the Action was not allowed to be a Witness to prove the Plaintiff in that Action guilty of the Forgery. Cited in the Case of *The King* against *The Warden of the Fleet*, 12 *Mod.* 339.

In some criminal Cases, interested Persons are allowed as Witnesses; as where the owner prosecutes an Indictment of Felony for stolen Goods, he is concerned in Interest; for he will be intitled to Restitution, and yet his Evidence admitted.

Constant Experience, and the very Statute of 21 H. 8. c. 11. that gives Restitution of Goods to the Party prosecuting an Indictment of Felony, makes it evident that he may be, and indeed ought to be, the Witness to convict the Felon, though thereupon he is to have Restitution of the Goods stolen. 2 H. H. P. C. 281.

So in removing an Indictment by *Certiorari* into the King's Bench, though the Prosecutor in that Case, if the Defendant be convicted, is by the Statute intitled to his Costs, yet he is allowed as a Witness: So where though a Man will, in Case of Conviction, be intitled to 40 l. yet his Evidence shall be received. And *Parker C. J.* said, that as to the Cases where 40 l. Reward, &c. they admit of this Answer, that the Intention of those Acts would be quite defeated, if the Reward was to take off the Evidence. The same Answer may serve to the Cases put upon an Indictment of Felony for stolen Goods, and where the Indictment is removed by *Certiorari*, &c. for none in the first Case, but the Owner can prove the Property of the Goods; and in the second, if the giving Costs should take off the Evidence of the Prosecutor, that Act of Parliament designed to discountenance the Removal of Suits by *Certiorari*, would give the greatest Encouragement to them that is possible. *Regina versus Muscot*, 10 Mod. 192.

On the
Statute of
Hue and
Cry.

In an Action against an Hundred, upon the Statute of Hue and Cry (13 E. 1. St. 2. c. 2.) any Person inhabiting within the Hundred, shall be admitted a Witness for the

the Hundred. *Stat. 8 Geo. 2. c. 16. §. 15.*
2 Ro. Ab. 685. p. 6, 7. Style 233. 2 Sid. 2.
2 Show. 47.

A Carrier brought an Action against the Hundred of *Hertford*, on a Robbery committed upon his Servant in his Abience; and the Question was, whether the Master being Plaintiff in the Action might be a Witness, to prove that before the Servant went on his Journey, in which he was robbed, he the Plaintiff delivered to his Servant the Money of which his Servant swore he was robbed; because it might be proved by some other, and no Person is to be a Witness in his own Cause, but for Necessity; as if he himself had been robbed, though he be Plaintiff, he may be a good Witness to prove the Robbery, and of what Sum or Things; and also to prove that he gave Notice to the next Vill, and levied Hue and Cry, because it is of Necessity, for want of other Proof. But Proof that he delivered the Money to his Servant before the Robbery, and before he went his Journey, may be made by any other as well as by him; tho' it was objected, that it was not safe or usual for a Man to call Witnesses when he delivers Money to carry in a Journey, for the Danger of Discovery. And for this Reason against the Opinion of *Roll*, the Plaintiff was received as a Witness. *Mich. 1650. Benet versus Le Hundred de Hertford, 2 Rel. Abr. 685. p. 7. Per Parker C. J.* The allowing the Testimony of the Party robbed in an Action upon the Statute of Hue and Cry is founded on

the Necessity of the Case, and that only.
The Queen against Muscot, 10 Mod.
 193.

Legatee.

Tho' upon a Trial one who is a Legatee by a Will, may not be admitted a Witness to prove that Will, in Respect to the Interest which he claims by the Will; yet he may be examined as a Witness to prove a Deed or other Thing, which hath no Relation to the Will; *per Roll C. J.* 3 *Str.* 370.

A Question was in Chancery, whether a Legatee could be a Witness against a Will? *Et per Curiam*, The Reason why a Legatee is not a Witness for the Will, is, because he is presumed to be partial in swearing for his own Interest: But the Legatee, when he swears against the Will, swears against his Interest, and so is the strongest Witness. *Oxenden versus Penrice*, 2 *Salk.* 691.

An Action upon the Case was brought against an Executor upon his own Promise, for burying the Testator: Upon *Non Assumpsit* pleaded, and Issue thereon, at the Trial, they called a Legatee to prove the Promise; but he was rejected, as being interested in the Cause; for should Judgment be given upon his Evidence against the Executor, it being a Charge against him in his own Right, he must answer it of his own proper Goods, and so the Assets remain untouched, and remain to satisfy his Legacy; whereas if Judgment should be for the Executor, another Action might be brought against him in the Right of the Testator, whereby the Assets

sets might be affected. *Mich. 12 Geo. 2. at Sittings B. R. Hasledone versus Westcombe.*

In an Action upon the Case against a Sheriff for a false Return of *Non est inventus*, to a *Capias ad Satisfaciendum*; the Bailiff is no legal Witness to prove that he endeavoured to arrest the Party, but could not; because he is interested in the Cause, having given Security for his due executing Process, and by Consequence could not be a Witness in his own Cause. *Powel versus Hord, 2 L. Raym. 1412.*

In an Action for Stockings sold, the Defendant pleaded that it was not he that bought them, but his Son, who sent them to *France* in way of Trade, and to prove this, he would have called his Son. *Parker C. J.* He cannot be a Witness, because here is an Advantage made by way of Trade, and to whom this Advantage shall accrue, depends intirely upon this Contract, and now one comes to swear that he made the Contract himself. *Reeves versus Symonds, 10 Mod. 291.*

In an Action upon the Case for managing the Defendant's Ship so negligently, that it ran over a Barge the Plaintiff was possessed of, laden with diverse Goods and Merchandizes; the Pilot was not admitted to be a Witness, because if faulty in steering, he was answerable to the Master. *Martin versus Hendrickson, 1 Salk. 287.*

On an Action for trying the Boundaries of Lands lying in two Parishes; the Parson of one of the Parishes was not admitted

mitted to be a Witness, because his Testimony might be a Means of enlarging his own Parish, and consequently the Tithes. But one who about seven Years before had taken the Profits, under the Title of one of the Parties, was received as a Witness; because now he might plead the Statute of Limitations. *Wharton versus Robinson*, 7 *Mod.* 63.

If *A.* advances Money to carry on a Cause, and has a Security deposited in his Hand, Part of which is the Thing in Demand, though the Residue of the Security, exclusive of this, is a sufficient Security for the Money, he cannot be a Witness in the Cause; because he swears to mend his own Security. *Per Holt C. J. Norris versus Napper*, 2 *L. Raym.* 1008.

R. V. having sent a Box by *T.* a Carrier, which Box was lost; *T.* brought an Action of Trover against *C.* for the Box, pretending that it was delivered to him amongst other Goods; upon the Trial the Wife of *R. V.* was produced to be a Witness to prove what was in the Box; but *Holt C. J.* refused to admit her, because whether *T.* recovered or not, this Verdict might be given in Evidence by *R. V.* in an Action to be brought by him against *T.* with Oath made of what was sworn for *T.* in this Trial. *Tiley versus Cowling*, *L. Raym.* 744.

An Executor brought an Action upon the Case *sur Assumpsit* for Money which was due from *A.* to the Testator, and which after the Testator's Death the
Defen-

Defendant had received from *A.* to the Plaintiff's Use, and upon the Trial produced *A.* as a Witness to prove the Payment to the Defendant. *Holt C. J.* The Plaintiff, by bringing this Action against the Receiver, has determined his Election of suing the original Debtor; yet, if he be nonsuited, the Matter is at large again, and he may sue the Debtor; so that what he would now swear would tend to discharge himself, and consequently he is no good Witness. *Clerk versus Dealy, 6 Mod. 151.*

In an Action upon a Bill of Exchange, the original Drawer was called to prove that he did not draw the Bill; but he was rejected because the Burthen must fall on him at last. *12 Mod. 345.*

Two Persons claiming several Rent-charges by the same Deed, cannot be Witnesses for one another, because concerned in Interest; but if one of them release his Rent-charge, and that is proved, he may be examined as a Witness. *Culpepper versus Fairfax, 2 Vern. 375.*

Upon Trial the Question was, Whether every House in *Newgate Market* round, had not so many Feet of Ground towards the Market, belonging to it? a House-keeper, who pretended the like Interest before his Door, though he derived his Title under another Person, was not admitted to give Evidence. *12 Mod. 372.*

Under the Statute of Distribution, none of the Intestate's Children, can be admitted to be Witnesses. *Per Jefferies C. J. Palmer versus Alicoek, Skin. 223.*

A.

A. being indebted to *B.* gave him a Note in a feigned Name for the Debt; afterwards the Wife of *B.* runs away with another Man, and takes the Note with her: *A.* pays the Money to *B.* the Person with whom the Wife run away sues *A.* for the Money in the feigned Name; upon the Trial, *B.* cannot be admitted a Witness to prove this Fact; for, *per Holt, C. J.* it is to prove a Right in himself to the Money received from *A.* for which otherwise he is accountable to *A.* 12 *Mod.* 564, 565.

A Person contracted is no Witness on a matrimonial Contract, nor in an Information thereon. *Rex versus Dean, Comb.* 360. On a Question whether *A. B.* was married to *C. D.* before he was married to *E. F.* the Court would not receive *C. D.* to prove that she was not married to *A. B.* *Lil. P. R.* 556. *Tit. Evidence.*

It being proved upon the Trial in an Ejectment, that the Mother had made a Bargain with the Lessor of the Plaintiff, that in Case he recovered, she should have a Thousand Pounds and the Thirds of the Estate, she was not admitted to be a Witness. *Hicks versus Gore, 3 Mod.* 84.

In Ejectment, the Patron is never admitted to be a Witness to prove the Title of his Clerk. *Jones versus Bean, 4 Mod.* 17.

An Action upon the Case was brought by the Master of a Ship against Custom-house Officers, for refusing to clear his Ship and re-deliver his Cockets; and upon the Trial a Question arising, whether the
Owners

Owners of Goods aboard might be Witnesses to prove the Plaintiff Master, &c. It was urged, that they might, as well as one Mariner to prove Wages due to another; but it was answered, that there the Contracts are several, and that one Commoner cannot be a Witness to prove the Right of Common in an Action brought by another, for the Right is intire, and he swears a Title to himself; and so here they are all concerned in one Bottom, and in one Adventure, and therefore could not be sworn; and of that Opinion was the Court. *Sandys against The Custom-house Officers, Skin. 174.*

In an Ejectment of a Manor, upon an Issue directed out of Chancery to try the Number of Acres; one, against whom an Action was depending as a Trespasser, was rejected, and not allowed to give Evidence. *Tuckey versus Sibley, 2 Keb. 435.*

In an Ejectment of Tithes, a Copyholder in Reversion after an Estate-Tail was not admitted to give Evidence of the Boundary of the Parish, for the Possibility, which makes him partial. ———
versus *Hitchcock, 2 Keb. 435.*

In an Action of Trover, brought by the Assignees of Commissioners of Bankruptcy, for 180 Pipes sold by the Plaintiff to the Defendant, which Sale the Plaintiffs insisted was fraudulent; the Defendant excepted to a Witness, because he was a Creditor, and might come in before a Dividend; but after four Months after any Dividend, he is a good Witness, for no other Dividend shall be intended; but here

here no Dividend having been made, he was set aside. *Bents versus Micko*, 2 *Keb.* 348.

A Man shall not be admitted to be a Witness to prove a Bond or other Deed, which he takes in the Name of another. 2 *Lil. Pr. Reg.* 250. *Tit. Obligation.*

If *A.* having made a Feoffment to *B.* afterwards makes a Feoffment of the same Land to *C.* and thereby covenants, that at the Time of this last Feoffment he was seised in Fee, and that *C.* shall quietly enjoy the Lands: On a Trial touching the first Feoffment, *A.* shall not be admitted as a Witness, to prove that he never made such Feoffment; because then he would swear for himself, to save his Covenant in the last Feoffment. *Pasch.* 15 *Jac.* 1. *B. R. Serle versus Serle*, 2 *Rol. Abr.* 685. *p.* 1.

On a Trial at Bar, an Executor being produced as Witness to prove a Will, was excepted against, because he was an Executor in Trust, and was to have 1000*l.* for executing the Trust; and the Exception was allowed, and the Party not admitted to give his Testimony. *Mich.* 1656. *B. S. Brucercliffe versus Tallum.* *M. S. Style* 14. *b.*

The Obligee made the only living Witness to the Bond Executor, the Executor was allowed at Law to prove the Hands of the Witnesses. *Gosse versus Tracy*, 2 *Vern.* 700. *Peer Will.* 289.

Six thousand Pounds were devised to *A.* and *B.* in Trust to purchase Lands to be settled on *F. G.* for Life, contingent Remainder

mainder to his Sons in Tail, Remainder to *W. G.* for Life, contingent Remainder to his Sons in Tail, Remainder to *H. K.* in Fee, with Power to make Leases for the best Rent that could be got, &c. *F. G.* made a Lease to the Defendant at 170 *l.* per Annum Rent, and died; and the Question was, Whether the Value was not 270 *l.* at the Time of the Purchase? The Trustees being produced as Witnesses to prove it, they were objected to, because *K.* the Remainder man, who now contested the Lease, not joining in the Purchase; if the Lands were not of that Value, it would be a Breach of Trust in the Trustees, for which they would in Equity be liable to make Satisfaction; and therefore their Evidence would be in Excuse of themselves: But this Objection was over-ruled, and they were allowed to give Evidence. *Kinsman versus Crooke*, 2 *L. Raym.* 1166.

One Creditor may be a Witness to prove Assets in an Action brought by another Creditor. *Per Holt C. J.* 12 *Mod.* 385.

On an Information for building Locks upon the River *Thames*, it is no Exception to a Witness here, that he contributes to carry on the Suit, or that this publick Nuisance is to his private Nuisance. *Per Holt C. J. Rex versus Clark*, 12 *Mod.* 615.

In an Information on the Statute of Deer stealing, Exception was taken to a Witness, because he was Party and Prosecutor. *Lord Chief Justice*: The Mischief of the Party's being likely to forswear

swear himself for Gain, might have been a good Exception to the Act before it was made, but it is none now. And the Exception was over-ruled. *Rex versus Drake, Comb. 35. 2 Show. 489.*

Upon the Capture of a Prize, one third Part belonged to the Master, and the other two third Parts belonged to the Owners; the Master disposed of 100 Chests of Lemons (being *bona peritura*) to *A. B.* for to be sold, and afterwards bringing an Action of Account against *A. B.* upon the Trial one of the Mariners was allowed to be a Witness, though it appeared that he was to have a Share of the Master's third Part; for the Master is accountable to the Mariners for their Shares, whether he recovers in this Action or not. *Skin. 403.*

On a Trial upon a *Scire Facias*, to avoid the Patent of an Office, Exception was taken to one offered as a Witness, because he was to be Deputy to the Party who would avoid the Patent; but by the Opinion of three Judges against one, he was allowed to give Testimony, because the Suit was between the King and the Patentee. *Hanning's Case, 1 Mod. 21.*

A Tenant of a Manor may be a Witness to prove a Custom in the Manor, if he claims nothing under the Custom. A Copyhold Tenant, who had nothing but a Wear in the Sea, between high and low Water Mark, was admitted to prove a Custom, for a Copyholder to cut down Trees

Trees without Licence. *Chamberlain versus Drake*, 2 *Sid.* 8, 9. 12 *Mod.* 24.

In Ejectment an Exception was taken to a Witness, who was called to prove the Ejectment-Lease, because he had the Inheritance of the Land demised; but both Plaintiff and Defendant claiming under him, the Exception was over-ruled. *Fox versus Swan*, *Style* 482. His Claim being paramount both Titles of Plaintiff and Defendant, he was admitted to give Evidence. *Wicks versus Smalbrooke*, 1 *Sid.* 51. 1 *Keb.* 134.

A Prebendary had made a Lease of a Rectory to his Son, with the usual Covenants; the Son brought an Action against A. who claimed by an antient Lease, and was in Possession, the Father (being now Bishop of the Diocese in which, &c.) was admitted to be a Witness for the Son; though it was objected that in the Lease he had covenanted that his Son should quietly enjoy. *Pasch.* 14 *Car.* 2. *B. R.* *Gie versus Rider*, 1 *Sid.* 75. 1 *Keb.* 280.

Verdicts.

IN Conspiracy for a Conspiracy at one Verdict in Day, or in Trespass for a Battery at Respect to one Day, or in Case for an Escape at one the Time Day, the Jury may find the Defendant guilty laid in the at any other Day, so it be at a Day be- Issue. fore the Action was brought, 39 *E.* 1. 3. 20 *H.* 6. 34. *Cro. Eliz.* 53. 1 *Inst.* 283. a. In

swear himself for Gain, might have been a good Exception to the Act before it was made, but it is none now. And the Exception was over-ruled. *Rex versus Drake, Comb. 35. 2 Show. 489.*

Upon the Capture of a Prize, one third Part belonged to the Master, and the other two third Parts belonged to the Owners; the Master disposed of 100 Chests of Lemons (being *bona peritura*) to *A. B.* for to be sold, and afterwards bringing an Action of Account against *A. B.* upon the Trial one of the Mariners was allowed to be a Witness, though it appeared that he was to have a Share of the Master's third Part; for the Master is accountable to the Mariners for their Shares, whether he recovers in this Action or not. *Skin. 403.*

On a Trial upon a *Scire Facias*, to avoid the Patent of an Office, Exception was taken to one offered as a Witness, because he was to be Deputy to the Party who would avoid the Patent; but by the Opinion of three Judges against one, he was allowed to give Testimony, because the Suit was between the King and the Patentee. *Hanning's Case, 1 Mod. 21.*

A Tenant of a Manor may be a Witness to prove a Custom in the Manor, if he claims nothing under the Custom. A Copyhold Tenant, who had nothing but a Wear in the Sea, between high and low Water Mark, was admitted to prove a Custom, for a Copyholder to cut down
Trees

Trees without Licence. *Chamberlain versus Drake*, 2 *Sid.* 8, 9. 12 *Mod.* 24.

In Ejectment an Exception was taken to a Witness, who was called to prove the Ejectment-Lease, because he had the Inheritance of the Land demised; but both Plaintiff and Defendant claiming under him, the Exception was over-ruled. *Fox versus Swan*, *Style* 482. His Claim being paramount both Titles of Plaintiff and Defendant, he was admitted to give Evidence. *Wicks versus Smalbrooke*, 1 *Sid.* 51. 1 *Keb.* 134.

A Prebendary had made a Lease of a Rectory to his Son, with the usual Covenants; the Son brought an Action against A. who claimed by an antient Lease, and was in Possession, the Father (being now Bishop of the Diocese in which, &c.) was admitted to be a Witness for the Son; though it was objected that in the Lease he had covenanted that his Son should quietly enjoy. *Pasch.* 14 *Car.* 2. *B. R.* *Gie versus Rider*, 1 *Sid.* 75. 1 *Keb.* 280.

Verdicts.

IN Conspiracy for a Conspiracy at one Verdict in Day, or in Trespass for a Battery at Respect to one Day, or in Case for an Escape at one the Time Day, the Jury may find the Defendant guilty laid in the at any other Day, so it be at a Day be- Issue. fore the Action was brought. 39 *E.* 1. 3. 20 *H.* 6. 34. *Cro. Eliz.* 53. 1 *Inst.* 283. a. In

In Trespafs for a Battery at one Day, the Defendant justifies at another Day, with a Traverse before and after, the Jury may find him guilty at another Day. 20 H. 6. 14. b.

But if in Trespafs for a Battery on such a Day in such a Year, the Defendant agreeing with the Plaintiff in the Day and Year, pleading that the Battery was from the Plaintiff's own Assault on the Defendant, and the Plaintiff joins Issue upon that Matter; the Jury cannot find the Defendant guilty, nor can Evidence be given of a Battery at another Day, for the Day is made Part of the Issue. *Trin. 11 Jac. 1. B. R. Downs versus Scrimsher, 2 Rol. Abr. 687. K. p. 4. 1 Brownl. 223. 1 Brownl. 182. Sed vide 2 Rol. Abr. 688. p. 3.*

In an Action of Trespafs, for an Assault, Battery and wounding, on the first of August; the Defendant justified in his own Defence, by Reason of an Assault made by the Plaintiff; upon the Trial the Defendant gave Evidence of an Assault and Battery by the Plaintiff, on the second of July before, and that it was in his own Defence, and produced Witnesses to prove it; the Plaintiff shewed that the Battery which he intended was on the ninth of July, and produced Witnesses to prove that: It was insisted that this was no Evidence, for that the Plaintiff should have replied specially, and shewn the special Matter: But the whole Court said he needed not; and had he shewn another Day in his Replication, it had been a Departure;

Departure; and his shewing his Evidence at another Day, without *son Assault*, is sufficient; for the Day is not material. *Jones* said, If they had both agreed on one Day, it should have been specially pleaded. But *Brampton* held it all one, and it is now pleaded to be at several Days, it is clearly unnecessary. And the Court said, it was so clear that they would not have it found specially. *Cro. Car.* 514. *Jones* hesitated, and would have had it found specially. 2 *Rol. Abr.* 680. p. 4. In an Assault and Battery, the Defendant justified, and upon Trial (at *Nisi Prius* in *Middlesex*) the Defendant proved his Justification at one Time; and *Thompson* said, the Plaintiff could not, without a special Replication, give in Evidence a Battery at another Time. The Chief Justice was of the same Opinion; wherefore the Plaintiff was nonsuited. *Pasch.* 3 *Jac.* 2. *B.R. Anonymus, Comb.* 50.

In Trespass local, the Plaintiff cannot In Respect find the Defendant guilty in another County to the
iv. 9 *H.* 6. 63. 8 *E.* 4. 22 *E.* 4. 19. Place.
Bro. Traverse per, &c. pl. 14. *Sed vide*
 3 *Salk.* 364. A Jury of the County of *Buckingham* cannot find the Foundation of a Priory in the County of *Oxford*, because it is local. *Mich.* 8 *Jac.* *Exer* versus *Moyle*, 2 *Rol. Abr.* 688. p. 2. In Replevin, if Tender of Homage be alledged at *D.* in another County, and upon this a Jury comes from *D.* they cannot find the Tender in any other County. 21 *E.* 3. 11. b. 56. b. The Jury cannot find, that by Virtue of certain Deeds, which are
 I dated

dated in a foreign County, Seisin was delivered of certain Lands in the County of which the Jury is, nor can they take Conusance of the Making those Deeds. 1 *Aff.* 16.

An Action was brought in an inferior Court, for Words spoken within the Jurisdiction; and it was alledged that by Reason of speaking those Words, the Plaintiff had lost Customers at *D.* which was out of the Jurisdiction. It was held, that the Jurors in a private Jurisdiction have no Authority to inquire of any Matter out of the same; but here the Allegation is only in Respect of Damages, and for the Increase of them, which they may inquire of in any Place whatever. *Hill.* 15 *Car.* 1. *B. R. Ireland* versus *Bockwell*, *Cro. Car.* 570. 1 *Jones* 450. 2 *D. A.* 300. *p.* 4.

It was held that a Jury of one County might find that the Plaintiff's Father died seised in another County; for the Question was, whether he died seised or not, and no Regard is to be had to the Place; and the Place which comes, by shewing of the Jury in their Verdict, shall not be entered. 18 *E.* 2. *Bro. Verdict* 24. *Vide* 1 *Aff.* 16. *Bro. Jurors* 20.

In an Action of Debt against an Heir, the Jury of one County must find Assets in another County, if sufficient Evidence be given; for it is not local. 6 *Co.* 47. *Cro. Jac.* 55, 502. 2 *Rol. Abr.* 689. 7. In an Action of Debt against an Executor, the Jury may find Assets in *Ireland*, for the finding beyond Sea is Surplusage, the Substance

Substance of the Issue is Assets or no Assets, and an Executor shall be charged for Goods in any Part of the World. 6 Co.

47. Trespass of Battery and carrying away goods, is not local, and therefore may be brought in another County than where the Trespass was done, and if the Defendant pleads Not guilty, the Jury may find him Not guilty, by Reason it was done in another County, and they may find him Guilty, if they will; for they may take Notice of an Act which is not local, done in another County. *Bro. Lien* 65. *Bro. Jurors* 37, 50.

The Verdict must find the whole Issue, Verdict and not Part of it; as if an Information must find of Intrusion be exhibited against a Man the whole for intruding into a Messuage and 100 Acres of Land, and upon the General Issue, the Jury find against the Defendant as to the Land, and say nothing as to the Messuage, this is insufficient for the whole; but if the Verdict finds the whole Issue, and more, that which is over and above the Issue, shall not hurt the Verdict. *1 Inst.* 227. a.

A Jury cannot determine the Intentions A Jury in Deeds or Last Wills, because the Con- cannot find struction of them is to be governed by the the Inten- Rules of Law, and therefore belongs to tion of a the Court; but what is or is not an In- Deed or tent to do a Thing within an Act of Par- Will. liament, is fit for their Determination; because such Intent is to be collected from Facts and Circumstances, of which they are the proper Judges. *Per Raymond C. J.*
Pasch.

Pasch. 4 Geo. 2. B. R. The King against Crooke, Gibb. 262.

Nor contrary to what is agreed by the Parties.

A Jury is not to inquire of that which is agreed by the Parties. *2 Rol. Abr. 691. R. p. 1.* Neither can they find contrary to what is admitted by the Parties, *Pain. 509.* either in the same or a former Action. *Palm. 19.* As in a *Quare Impedit*, the Plaintiff declared that the Church was void by the Resignation of *P.* and Judgment was given; Whereas in Truth *P.* did not resign, but died, pending the Suit and Lapse falling to the Archbishop he presented *M.* the former Defendant, against whom *M.* made a Lease of his Glebe, and in an Ejectment brought by the Lessee, the Jury found that the Church became void by the Death of *P.* and that Lapse incurred to the Bishop, who collated *M.* and Judgment was given for his Lessee. The Question was, whether the Jury might find Matter contrary to that which was confessed by the Parties themselves, and found by Verdict, on which a Judgment was given in the first Action; for there it was by the Resignation of *P.* but now it was found to be by the Death of *P.* It was argued that they could not, for when a Thing is confessed by the Party, and admitted in pleading and passed by, not being denied, they cannot find contrary, neither in the same nor in any other Action. (*15 Aff. 94. Fitz. Verdict 27. 7 E. 31. 28 Aff. 34. 31 Aff. 12.*) the Cause was agreed to by the other Side; but they insisted that the Confession was false and that the Title of the Defendant

now a new Title. But the whole Court agreed that the Jury cannot find for him, or any claiming under him. *Palm.* 19.

If in Dower, the Tenant says that he has always been ready to render Dower, and the Issue is, whether the Husband died seised; the Jury cannot inquire whether the Husband was seised of an Estate dowable, for that is confessed. 11 *H.* 4. 40. *b.* 2 *Rol. Abr.* 691. *p.* 2.

If in Action of Waste, the Defendant does not deny the Waste, but pleads another Matter, *to wit*, where the Waste is assigned in *A.* and *B.* that there is no such Vill called *B.* and this is found against him, the Jury is not to inquire if the Waste be done or not, nor whether the Plaintiff has any Land where the Waste is assigned; but they ought to give Damages according to the Confession of the Party, though no Waste be done. 9 *H.* 6. 66. *b.* 2 *Rol. Abr.* 691. *p.* 3, 4. 691. *p.* 5, 6, 7, 8, 9, 10. 3 *Leon.* 209. 4 *Leon.* 55. 2 *Brownl.* 149.

In Replevin, the Defendant set forth, that the Plaintiff held the Lands by Fealty, and the Rent of 12 s. 4 d. and a Heriot, &c. upon every Alienation without Notice, and so justified the taking for a Heriot; the Plaintiff confessed the Tenure by Fealty, and 12 s. 4 d. Rent, but denies the Heriot to be due upon every Alienation. The Jury gave a special Verdict, and found the Tenure to be by Fealty, the Rent of 3 s. 1 d. and a Heriot payable upon every Alienation, with or without Notice. It was objected, that here was a

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Variance

Variance between the Avowry and the Verdict; for in the one the Rent was alleged to be 12 s. 4 d. and in the other it was found to be but 3 s. 1 d.; but both Parties having agreed in pleading that the Rent was 12 s. 4 d. the Court was unanimously of Opinion that Judgment should be given for the Defendant; for as to what is agreed in pleading, though the Jury find otherwise, the Court is not to regard it; and here the Substance of the Issue, as to that Part of the Heriot, is well found for the Defendant. *Wilcox versus Skipwith*, 2 Mod. 4.

In an Action upon the Case against the Sheriff, for an Escape, the Plaintiff declared that the Defendant arrested L. at the Plaintiff's Suit, by Virtue of a *Latitat* sued out the 21st of Jan. &c. The Jury found that the *Latitat* bore Teste the 28th of Nov. before, but in Truth was taken out the 21st of January following. It was objected, that by the Law it must be said to be taken out when the Teste is, and that where the Parties in pleading have agreed a Point certain, the Jury is estopped to say the contrary. *Pemberton C. J.* said, that the Course of the Court is to teste *Latitats* taken out in the Vacation, as of the Term preceding, and the Plaintiff might have declared of a *Latitat* sued out the 21st of Jan. and tested the 28th of November; and if so, certainly the Jury might find the whole Matter, and there is *veritas legis* & *veritas facti*; and therefore Judgment was given for the Plaintiff. *Walburgh versus Saltonstall*, 1 Vent. 362. *Skin. 32. 2 Jones 149.*

A Verdict must be a direct and not an argumentative Answer to the Issue; as if an Issue be, whether where a Copyhold is granted to three for the Lives of two, he, who dies seised, &c. by the Custom of the Manor ought to pay a Heriot; if the Jury find that there never was such an Estate granted within the Manor, this is ill, because it is only an Argument, that no Heriot ought to be paid by the Custom. *Mich. 15 Jac. 1. B. R. Ven versus Howel, 2 Rol. Abr. 693. p. 1.* So in an Action of Debt for 20*l.* if the Defendant pleads that he paid the 20*l.* and the Issue is, whether he paid it or not, and the Jury finds that he owes the 20*l.* this is not good, because it is but by way of Argument. *Ibid. p. 5. Noy 147. Vaugh. 77.*

The legal Verdict of the Jury to be recorded, is finding for the Plaintiff or Defendant; what they answer, if asked, to Questions concerning some particular Fact, is not of their Verdict essentially; nor are they bound to agree in such Particulars. If they all agree to find their Verdict for the Plaintiff or Defendant, they may differ in the Motives wherefore, as well as Judges, in giving Judgment for the Plaintiff or Defendant, may differ in the Reasons wherefore they give Judgment, which is very ordinary. *Vaugh. 150.*

The Jury may find the Defendant Guilty of Part, and Not guilty of the rest, or may find the Defendant Guilty of the Fact, but vary in the Manner. 2 *H. H. P. C. 301, 302.*

Verdict
must be
certain.

A Verdict must be certain, and not doubtful or ambiguous, for then no Judgment can be given upon it: As if an Executor pleads that he hath fully administered the Goods of the Testator, and the Jury finds that he has Goods in his Hands, they must find to what Value. 1 Inst. 227. a. *Bro. Verdict*, pl. 65. 40 E. 3. 15. 2 *Rol. Abr.* 694.

But in an Action of Debt upon a Bond against an Heir, if he pleads that he has nothing by Descent in Fee, and the Plaintiff replies that he has by Descent in Fee diverse Lands in such a County, the Jury may find that he had diverse Lands in Fee by Descent, without finding what Lands, it not being material; because, for the false Plea of the Heir, a general Judgment is to be given against him, without having any Regard to the Assets. *Everet versus Sutcliffe*, 2 *Rol. Abr.* 694. U. p. 4. 1 *Rol. Rep.* 234. *Godol.* 147.

Ejectment of thirty Acres of Land in D. and S. the Defendant was found Guilty in ten Acres, and as to the Residue, Not guilty; it was moved that the Verdict was uncertain in which of the Villis these ten Acres lay, and therefore no Judgment or Execution could be given on it for the Plaintiff; but the Court held it to be good, and that the Court should take Information from the Plaintiff, for what ten Acres the Verdict was. *Cro. Eliz.* 465. *Goldb.* 188.

In Ejectment of Mesuages, 3000 Acres of Land, 3000 Acres of Pasture in D. by the Name of the Manor of M. and five Closes by the Names of, &c. the Jury find as to four Closes of Pasture, containing

taining by Estimation 2000 Acres, that the Defendant was Not guilty; and as to the Residue, they find a special Verdict. It was resolved by the Court, that the Verdict was uncertain in both Respects; and therefore no Judgment was given, but a *Venire Facias de novo* was awarded. *Cro. Jac.* 113.

In an Action of Trespafs, for a Trespafs in *W.* acre, expressing the Buttals, the Jury found the Defendant Guilty as to a Moiety of the said Acre, without any Certainty of which Moiety, and the Verdict was held to be good; but it would have been otherwise in an Ejectment; because there, there ought to be Certainty to make Execution of it. *Noy* 125. *1 H.* 7, 9. *a. Tel.* 114. *1 Brownl.* 114, 210. *Cro. Jac.* 183.

On an Indictment for exercising a Trade for three Months from such a Day to such a Day, not having served seven Years, the Jury found the Defendant Guilty for one Month, and Not guilty for the Residue. On Motion in Arrest of Judgment, because of the Incertainty for which of the three Months the Defendant was found Guilty, so that he could not plead this Conviction in Bar of any other Indictment for the same Offence; the Court said, that he might plead a Conviction for one Month, with a Traverse of his being guilty in any other Month. *Mich.* 13 *W.* 3. *B. R. Anonymus.* *Cases B. R.* 561.

A Verdict is either general or at large, Of special which is also called a special Verdict. A Verdicts. general Verdict is that which is found ge-

nerally, according to the Issue, as if the Issue be, whether the Defendant is Guilty of a Trespass or not, and the Jury say that he is Guilty, or say that he is Not guilty, this is a general Verdict. A Verdict at large is so called, because it finds the Matter at large, and leaves it to the Judgment of the Court; or it is called a special Verdict, because it finds the special Matter, &c. 1 *Inst.* 228. *a.* as will appear in several Instances hereafter.

A special Verdict may be found by the Jury, as well on a special Issue as upon a general Issue, and as well in criminal Cases, which concern Life and Member, as in civil Actions. 1 *Inst.* 226. *b.* 227. *a.* *Sed vide Bendl.* 37, 47. *Dyer* 117. *b.* 9 *Rep.* 12. *b.* 2 *Inst.* 425. *Bernard. Rep.* in *B. R.* 32. *Bro. Verdict* 58. 7 *E. 4.* 29.

A special Verdict may be given in any Action, and

The Court cannot refuse a special Verdict, if it be pertinent to the Matter in Issue. 1 *Inst.* 228. *a.* *Sed vide* 1 *Sid.* 159.

the Court cannot refuse it.

If the Jury will take upon themselves the Knowledge of the Law, they may give a general Verdict, but it is dangerous for them so to do; for if they mistake the Law they run into the Danger of an Attaint; therefore, where the Case is doubtful, it is safest for them to find the special Matter. 1 *Inst.* 288. *a.*

In all special Verdicts the Court will not judge upon any Matter of Fact, but what the Jury declare to be true of their own finding; and therefore the Court will not judge

judge upon an Inquisition or such like, found at large in a special Verdict; for their finding it is not an Affirmation that all which is in it is true. *Trin. 1658. B. R. Street against Lord Roberts. 2 Sid. 86.*

It is a certain Rule in all special Verdicts, that if the Jury find the Point in Issue, and only put a special Doubt to the Court in Matter of Law, it is a good Verdict; but if they do not find a sufficient Matter of Fact to bring Light enough to the Court to resolve that Doubt, then it is an imperfect Verdict, and a *Venire Facias de novo* shall be awarded. This Rule is founded on undeniable Authority, and on clear and evident Reason, because the Jury are Judges of the Fact, though the Judges are to judge and determine the Law arising on that Fact; now the Jury being Judges of the Fact, they in finding the Gift of the Action, have taken upon them to find every Thing that is necessary to make the Defendant guilty, if the Point of Law be resolved for the Plaintiff. *Gilb. 255.*

In an Assise, the Jury found that the Tenant disseised the Demandant, *unless* certain Words in a Will gave the Tenant a Title: It was objected that the Court is to judge upon the Will itself and the Words only, and not the Will itself, being found, what follows after [*unless*] is not sufficiently found, and therefore the whole Verdict is void; but the Court held that the Verdict should stand, for the finding of the Disseisin implies a Seisin also. *Moor*

431. *Cro. Eliz.* 480. *Popb.* 110. 1 *Leon.* 88, 132. 3 *Leon.* 222. *Goldsb.* 92. 2 *Rol. Abr.* 693. *T. p. 1.* 695. *p. 1.* 696. *p. 2.*

In an Action upon the Case on Promises, the Jury gave this Verdict: We find that the Defendant did not promise, notwithstanding, if the two Witnesses *H.* and *W.* say true, as we think they do, then we find that the Defendant did promise, &c. and so leave it to the Court. It was held that this Verdict was clearly for the Defendant. *Lord Stafford* against *Hayward*, *Dyer* 372. 2 *Rol. Abr.* 695. *p. 2.*

If in an Ejectment of a Lease for Years, of twenty Acres, the Defendant pleads that he did not demise, and the Jury find that he demised ten Acres only, and conclude their Verdict thus; if upon the whole Matter, it shall seem to the Court that the Defendant demised twenty Acres, then they find for the Plaintiff, and if not, then for the Defendant; this is repugnant, and so the whole Verdict is void. 2 *Rol. Abr.* 695. *p. 4.* 703. *p. 13.*

In Action on the Case upon a Promise, the Defendant pleading that he did not promise, the Jury found for the Plaintiff, and assess the Damages at 33 *l.* 6. *s.* 8 *d.* to be paid in dying, if by the Law of the Land it can be done, and for Costs 6 *s.* 8 *d.* It was held, that the Jury having found that the Defendant promised in Manner and Form, &c. and taxed Damages and Costs, the Verdict is perfect, and then the Words to be paid in dying, if by the Law of the Land

Land it can be done, are void ; for it cannot be by the Law of the Land. 2 Rol. Abr. 695. p. 5. Cro. Car. 219.

In an Action on the Case, upon Promise, the Jury found a special Verdict in this Manner, viz. If the Law will that the Jurors shall give Damages to 40 l. then they assess Damages to 40 l. but if the Law will that they may give Damages at their Will, then they assess Damages to 3 l. and no more. This Verdict was held to be void, because the Jury ought to assess Damages in certain. 2 Ro. Ab. 696. p. 6.

In Ejectment, the Jury found a Will Of In- by which the Lands were devised to the tenant Lessor of the Plaintiff, and afterwards on a special Verdict, that if R. L. and H. (the subscribing Witnesses) are three sufficient Witnesses, according to the Statute, and as the Law requires, and the said Will so proved, be a good Will in Law, and sufficient to transfer the Lands in Question, then they say the Defendant is Guilty ; but if the said three Witnesses are not sufficient, then they say the Defendant is Not guilty. An Objection being made to the Verdict, because the Jury had not found that the Testator died seised: *Gilbert Ch. Bar.* thought that the Verdict was sufficient, because the Jury found that the Defendant was to be guilty, in Case the Will was good ; for in finding the Defendant Guilty, they found every Thing material to make him so, in Case the Matter of Law, as to which they doubted, appeared to be for the Plaintiff, and the Court cannot intend any Thing contrary to the Verdict ; therefore in this Case they cannot intend that the

Testator was not seised, or did not die seised; for then, instead of resolving the Matter of Law, they would take upon them to be Judges of the Fact, which is not their Province. If they should intend that the Testator was not seised, or did not die seised, they must intend that the Defendant was not guilty, though the Doubt of Law was for the Plaintiff, which would be an Intendment against the expresse Finding of the Jury, and then the Court, who are no Judges of the Fact, would resolve against the Judgment of the Jury, who are Judges of the Fact. *Lodge versus Jennings, Gillb. 255.*

After a Verdict, the Court will admit any Intendment to make the Case good, and therefore the Declaration being Trespass for taking the Plaintiff's Fishes in his several Fishery: The Chief Justice said, it might be intended a Stew-Pond, which is a Man's several Fishery. *1 Vent. 122.* So where the Action was for taking the Plaintiff's Pheasants, the Court would intend that they were dead Pheasants. *1 Vent. 123. T. Raym. 16.*

In a special Verdict, whereby any Man is to be charged, or hurt, or convicted; though the Jury find Matter of Evidence, enough for them to find the Fact, and give a Verdict against him; yet if they do not find the Fact, such Matter, though pregnant Evidence, will not empower the Judge to intend the Fact, and give Judgment against him as Guilty. *Hill. 13 W. 3. The King against Plummer, Cases B. R. 627.* The like as if a Writ
be

be sent to the Bishop, upon an Issue of *Ne unques accouple in loyal Matrimonie*, and he certifies the Evidence given before him, though the Evidence be ever so clear to prove the Marriage, the certificate is void, for he must return the Fact, that is, that the Parties were lawfully married, or that they were not lawfully married; for of that Fact he is the proper Judge, and not the Court, which sends the Writ to him. *Mich. 7 G. 2. C. B. Easterby* against *Easterby*.

In a special Verdict, all other Things shall be intended and supplied, but that which is referred to the Court. *5 Co. 97. 1 Vent. 118. Gilb. Eq. Rep. 256. Hob. 262. Skin. 465. 2 Rol. Abr. 698. p. 2.*

A Verdict shall be taken according to the Intent of the Jury, and does not require so precise a Form as pleading. *4 Co. 65. b. Hob. 76.*

In a special Verdict the Circumstances of every Thing need not to be so strictly found, as they are to be pleaded. *Cro. Eliz. 167. 2 Leon. 97.*

In an Action of Detinue of diverse Pieces of Plate, viz. a Bason, Ewer, Bowl and other Pieces; the Jury found that the Plaintiff was possessed of them, and by Deed sold diverse Pieces of Plate to the Defendant (and in the Deed the Bason, Ewer, Bowl, and all the other Pieces were mentioned,) upon Condition that if the Plaintiff paid a certain Sum to the Defendant at a future Day, the Sale was to be void, and they found the Payment on the Day; but the Judgment given for the

the Plaintiff upon this Verdict was reversed, because the Jury did not find the Pieces of Plate in the Declaration were the same Pieces that were mentioned in the Deed; but only that the Plaintiff sold diverse pieces, which, although they be all one in Name, may, notwithstanding, be several, and Intendment shall not help it. *Cro. Eliz.* 866.

Wheresoever a Jury begins with a special Matter, and after makes a general Conclusion upon it, contrary to that which the Law and the Court do judge upon the special Matter, found by them; or, on the other Side, when they begin with a direct Verdict, and yet after deduce a special Matter, which is contrary to their direct Verdict, or in Law proves the Truth, contrary to their general Verdict premised, and close them up, with submitting the whole to the Judgment of the Court; in both these Cases the special Matter makes the Verdict, and over-rules the general. *Hob.* 53.

If the Jurors take upon themselves the Conscience of the Law, and find the special Matter, and mistake the Law, the Judges of the Law shall give Judgment upon the special Matter according to the Law, without having any Regard to the Conclusion of the Jurors, who ought not to take upon them to judge of the Law. *11 Co.* 10. b.

Finding the Issue by foreign Implication is not good upon a general Issue; and therefore if an Action on the Case upon Promise and Plea of *No Promise*, the Jury find that by Non-performance of the Promise, the Plaintiff has sustained 50 l. Damages,

mages, not saying whether the Defendant promised or not; it is no Verdict. *Shelly versus Alsop*, Tel. 77. *Noy* 147.

Howsoever a Verdict seems to vary from the Issue, and conclude not formally or punctually to the Issue, so as you cannot find the Words of the Issue in the Verdict; yet if the Verdict may be concluded out of it to the Point in Issue, the Court shall work it into Form, and make it serve. *Per Hobart*, C. J. *Foster versus Jackson*, *Hob.* 54.

At the Assises or *Nisi Prius*, if the Verdict *de* Justices doubt of any Thing relating to *bene esse*. the Verdict, they may take it *de bene esse*. *Bro. Inquest* 8. *Nisi Prius* 7. *Protection* 30, 94. 48 *E.* 3. 7, 8. 35 *H.* 6. 58. *Brown's Anal.* 13.

If in an Action of Debt the Plaintiff Verdicts declares that he sold a Horse to the Defendant for 40 s. and the Defendant pleads from the that he owes the Plaintiff nothing, in Declaration Manner and Form as he has declared, and the Jury find that the Plaintiff sold two Horses to the Defendant for 40 s. this Verdict is against the Plaintiff, for it is not the same Contract. 21 *E.* 4. 22. 2 *Rol. Abr.* 702. p. 1. If in an Action of Debt for 24 l. 8 s. which the Defendant received to the Plaintiff's Use upon a Sale; the Defendant pleads that he owes nothing, and the Jury find that he owes the 24 l. but not the 8 s. this Verdict is for the Plaintiff, and he shall have Judgment, for it may be that the Defendant has paid the 8 s. *Baugh versus Philips*, 1 *Rol. Rep.* 257. 2 *Rol. Abr.* 702. p. 7.

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In an Action of Debt against *A.* as Daughter and Heir of *B.* the Defendant pleaded that she had nothing by Descent from *B.* upon which Issue was joined; the Jury found that *B.* was seised in Fee of Land and died seised, having Issue the Defendant his Daughter, his Wife with Child, which was afterwards born, was a Son, and lived about an Hour; this Verdict is against the Plaintiff, because the Defendant, the Daughter, has this Land as Heir to her Brother, who was last seised, and not as Heir to the Father; and so the Defendant had it not by Descent from her Father but from her Brother; and yet it is Assets in her Hands, if it had been specially pleaded (as *Dyer* 368. *pl.* 46.) *Trin.* 16 *Car.* 1. *C. B.* *Duke* versus *Spring*, 2 *Rol. Abr.* 709. *pl.* 62.

Part one
Way, and
Part an-
other.

In Trespafs for entering the Plaintiff's House, and taking his Goods, the Jury may find the Defendant Guilty of entering the House, and Not guilty of taking the Goods. 1 *Rol. Rep.* 423.

In Case upon Promise, for that the Plaintiff having sold the Defendant so much Wood, he promised to pay the Plaintiff so much Money, and to fetch the Wood away by such a Day; the Defendant pleaded, 1st, That he paid the Money, and that he did not promise to fetch the Wood away by such a Day. It was held, that the Jury could not find Part for the Plaintiff, and Part for the Defendant, *viz.* that the Money was not paid, and that the Defendant did not promise to fetch the Wood away, &c. for it being
but

but one Promise, and one intire Thing, it cannot be apportioned; and therefore they ought to find all for the Plaintiff, or all against him. *March 100.*

A Verdict that finds Part of the Issue, and finds nothing for the Residue, is insufficient for the whole, because they have not tried the whole Issue, wherewith they were charged. As if an Information of Intrusion be brought against one, for intruding into a Messuage and 100 Acres of Land; upon the general Issue the Jury find against the Defendant for the Land, but say nothing for the House; this is insufficient for the whole. *1 Inst. 227. a.* In an Action of Trespals, for breaking the Plaintiff's Close, and beating his Servant, the Jury find a special Verdict as to the entring the Close, but say nothing as to the Battery; the Verdict is void. *3 Leon. 83, 94.*

In an Action for beating Husband and Part only. Wife, if the Jury find the Defendant guilty of beating the Husband, and say nothing as to the Wife, the Verdict is void. *Hard. 166. Cro. Jac. 263. Latch 61.* And so it is, if, in an Action of Trespals for taking a Gown and Mantua, the Jury find a special Verdict as to the Gown, and say nothing as to the Mantua. *3 Lev. 55.* But if, in an Action against an Administrator, who pleads several Judgments obtained against him, whereupon Issue is taken that they are all kept on Foot by Fraud, the Jury finds any one of them to be kept on Foot by Fraud, it is sufficient, though they say nothing as to the other
Judg-

Against
some De-
fendants
only.

Judgments, because the Defendant's Plea is found to be false in Part, and therefore the Whole is intended to be false. *Carth. 196.*

In an Action against Husband and Wife, for beating the Plaintiff's Mare, and for other Trespases, upon Not guilty pleaded, the Jury find that the Wife beat the Mare, and as to the Residue, they find for the Defendant; this Verdict is imperfect, because it finds the Wife guilty of beating the Mare, but says nothing as to the Husband's Beating her, either by way of Acquittal or Condemnation; and the finding the Defendant Not guilty, as to the Residue, extends to the other Trespases. But if the Jury had found the Husband Not guilty of beating the Mare, the Verdict had been good. The like in an Action against *A.* and *B.* for a Battery, *A.* may be found guilty, and *B.* acquitted. *Tel. 106. 1 Brownl. 209. 1 Mod. 140. 1 Vent. 93. 1 Show. 350. Cro. Jac. 203. 3 D. A. 73. p. 5. Latch 61.*

In an Action on the Case upon Promise against four Defendants, who pleaded the Statute of Limitations, viz. that they had not promised within six Years; the Jury found that one of them had promised within six Years, and that the others had not. It was moved that no Judgment could be given against the Defendant, who was found to have promised within the six Years, for this was a Promise for Goods sold and delivered, and was an intire Contract: and therefore they must all be found to promise, or else it was against the Plaintiff. And *Pollexfen C. J. Poul J.*
and

and *Rekeby*, were of that Opinion, *Ventris J. contra*. Wherefore Judgment was given against the Plaintiff. *Bland versus Haslerig & al*, 2 *Vent*. 151.

If the Matter and Substance of an Issue True in be found, it is sufficient. 1 *Inst.* 227. a. Substance. If an Ejectment be brought of twenty Acres, on a Lease of twenty Acres, and the Defendant pleads that he did not eject the Plaintiff; if the Jury find him guilty but in 10 Acres, yet the Plaintiff shall recover. But it would be otherwise, if the Issue was, that the Party did not demise *Dal.* 105. pl. 50.

In Debt against an Executor for Rent due in the Life-time of the Testator, the Defendant pleaded a Levy by Distress, and so he did not detain; the Jury found that the Assignee of the Executor had paid the Rent to the Plaintiff, who had accepted it; but that no Distress was taken; the Court was of Opinion that the Substance of the Plea was found for the Defendant, for it was found that the Rent was paid, and so the Defendant does not detain it; and Judgment was given, accordingly. *Cecil versus Harris*, *Cro. Eliz.* 140.

If there is Surplusage in a Verdict, the Surplusage Court will reject the Surplusage. 7 *H.* 6. 8, 9, 10. 7 *H.* 7. 20. 1 *Le.* 323. 3 *Le.* 80. 11 *Mod.* 64. If the Jury give a Verdict of the whole Issue and more, &c. that which is more is Surplusage, and shall not stay Judgment; for *utile per inutile non vitiatur*. But necessary Incidents required

quired by Law, the Jury may find. 1 *Inst.* 227. *a.*

In an Action for breaking a House in such a Parish and Ward in *London*, the Defendant pleaded Not guilty, and the Jury found the Trespass, and that the House was in the Parish, but not in the Ward; Judgment was given for the Plaintiff, for the finding that the House was not in the Ward was Superfluous, and the Parties having admitted it, the Jury had nothing to do with it. *Hassel versus Juxon*, *Cro. Eliz.* 283.

If the first Part of a Verdict be full to the Issue, either expressly, or by Implication, and the latter Part any Ways contradicts the first Part; the first Part shall be good, and the latter Part void. *Per Doderidge J. James versus Harris*, 2 *Bull.* 56. 2 *Roll. Abr.* 718. *p.* 11, 13, 14. *Cro. Car.* 75.

In an Action against an Executor, for that his Testator the 16th of *October*, &c. in Consideration of 5 *l.* lent him, promised to pay it; the Defendant pleaded that his Testator did not promise; the Jury found that the Testator did promise in Manner and Form as the Plaintiff had declared, but that the Testator died on a certain Day, which was above a Year before the 16th of *October*, &c. the Time mentioned in the Declaration. It was resolved, that the Verdict being that the Testator promised in Manner and Form, &c. the rest was Surplusage, and that the Day was not material. *Inkersal versus Sams*, *Cro. Car.* 130. 1 *Jones* 192.

In

In an Action of Trespass for taking the Plaintiff's Sheep, the Defendant justifying for Damage feasant, the Plaintiff prescribing for Common for Sheep, and the Prescription being traversed, the Jury found that the Plaintiff had Common for Sheep, and also for Cows. The Court held, that was a general Verdict for the Plaintiff, and the other Matter found afterwards, was Surplusage, and void; and Judgment was given accordingly. *Bruges versus Searle*, *Carth.* 219. 1 *Show.* 347. 4 *Mod.* 89. *Cases B. R.* 25.

If the Jury in a special Verdict find the Issue, all which they find afterwards to the contrary, is Surplusage. 2 *Ld. Raym.* 860, 865.

Before the Verdict is recorded, the When a Jury may vary from the first Offer of their Verdict Verdict; but after it is recorded, they may be cannot vary from it; and that Verdict altered. which is recorded shall stand. 1 *Inst.* 227. b. 6 & 7 *R.* 2. *Fitzh. Corone* (107) 108. 20 *Aff.* 12. 5 *H.* 7. 22. b. 2 *H. H. P. C.* 299, 300. *Plowd.* 211. 2 *Rot. Abr.* 712. p. 2. *Dyer* 204. b. 205. a. pl. 3. 16 *Aff.* 15. 11 *H.* 4. 2. *Bro. Waiver de choses*, pl. 16. *Jurors*, pl. 7.

After the Rising of the Court, the Jury gave a private Verdict for the Defendant, and afterwards in open Court contradicted it, and gave a Verdict for the Plaintiff. It was resolved that Judgment should be given for the Plaintiff; for the last Verdict which was given openly in Court, is the Verdict in Fact, and not the first, which was only allowed for the Ease of the Jurors,

rors, that they might refresh themselves, *Moor* 33. *pl.* 108. and was but Matter of Courtesy, and not of Necessity; for the Plaintiff could not have been nonsuited, nor be demanded upon it, as he could upon that given in open Court; and as the Juros are charged in open Court, their Verdict ought to be given there openly. *Plowd.* 211. *Dyer* 209. *a.* *pl.* 21. 2 *H. P. C.* 299, 300.

Private
Verdicts.

After the Jury have agreed in their Verdict in Causes between Party and Party, if the Court be risen they may give a privy Verdict before any Judge of the Court, and they may eat and drink, and the next Morning in open Court may either affirm or alter their privy Verdict, and that which is given in Court shall stand. 1 *Inst.* 227. *b.*

A private Verdict given out of Court, before any of the Judges of the Court, is so called, because it ought to be kept secret and private from each of the Parties, until it be affirmed in Court. 1 *Inst.* 228. *a.*

Giving a private Verdict is only suffered for the Ease of the Jurors; and upon such a Verdict before the Justices, none of the Parties shall be demanded; (nor the Plaintiff be nonsuited) and if one of the Jurors die between the first Verdict and the second, or if the Judge die, the Verdict taken before is void; and yet neither the one nor the other, after Verdict given, shall hinder, but that Judgment shall be given. *Moor* 33. *pl.* 108. *Plowd.* 211.

And

And if the next Day the Jurors will say nothing, the Acceptance of the private Verdict shall be to no Purpose. *Moor* 33. *pl.* 108.

In criminal Cases of Life and Member, the Jury cannot give a private Verdict, but must give it openly in Court. *1 Inst.* 227. *b.* *3 Inst.* 110. *2 H. H. P. C.* 300. *2 Hawk. P. C.* 439. *c.* 47.

An Information was exhibited against the Lord of a Manor, for oppressing his Tenants, and for several Misdemeanors; the Jury gave a private Verdict in the County of the City of *E.* Whereas the Information was laid in the County at large; and this being objected as illegal, the Court said, it is intended that no private Verdict can be given in criminal Cases, which concern life, as Felony; because the Jury is commanded to look upon the Prisoner when they give their Verdict, and so the Prisoner is to be there present at the same Time; but in criminal Cases, where the Defendant is not to be personally present at the Time of the Verdict, a privy Verdict may be given. *The King* against *Ladsingham, T. Raym.* 193. And so it was said was the usual Course at the Assizes. *1 Vent.* 97.

New Trials.

When first
granted.

HOLT C. J. There have been new Trials antiently, as appears from this, that it is good Challenge to a Jurymen, to say that he hath been a Juror before in the same Cause. 2 *Salk.* 648.

Parker C. J. The Granting new Trials began about 1652, when the first new Trial was granted for Excessiveness of Damages. *Hil. 12 Ann. B. R. The Queen against Helston Corporation*, 10 *Mod.* 202. and cites the Case of *Wood versus Gunston*, *Str.* 462, 466, as the first Case of a new Trial that we find in our Books, and that it was after a Trial at Bar; and that one Reason why we do not find this Practice more antient, may be, that there are no Reports of old Motions. *Mich.* 1712. *B. R. The Queen against Bewdley Corporation*, 1 *Peer Will.* 213. But it is said to have been denied to be true, that new Trials began at that Time. *Mich.* 1758. *B. R. Dormer versus Fortescue*.

After Verdict for the Plaintiff, it was moved, upon Certificate of the Judge, that it passed against his Opinion, that Judgment might be arrested, and that there might be a new Trial, as had been done heretofore in like Cases. But *Roll J. contra*, though it has been done in the Common Pleas, for it was too arbitrary for them to do it, and you may have your Attaint against the Jury, and there is no other

other Remedy in Law for you ; but it were good to advise the Party to suffer a new Trial for better Satisfaction. And let the Defendant take four Days from hence to speak in Arrest of Judgment, if the *Postea* be brought in ; if not, then four Days from the Time it shall be brought in. *Mich. 24 Car. 1. B. R. Slado's Case, Sty. 138.*

On a Motion for a new Trial in an Action for Words, 1500 *l.* Damages being given, the Counsel for the Plaintiff opposed it, as being without Precedent. *Glyn C. J.* said, it is in the Discretion of the Court, in some Cases, to grant a new Trial ; but this must be a judicial and not an arbitrary Discretion ; and it is frequent in our Books for the Court to take Notice of Miscarriages of Juries, and to grant new Trials upon them : And it is for the People's Benefit that it should be so ; for the Jury may sometimes, by indirect Dealings, be moved to Side with one Party, and not to be indifferent betwixt them ; but it cannot be so intended of the Court : Wherefore let there be a new Trial in the next Term, and the Defendant shall pay full Costs, and Judgment to be upon this Verdict, to stand for Security to pay what shall be recovered upon the next Verdict. *Mich. 1655. Wood versus Gunston, Sty. 466.*

Where a Verdict is had in Pursuance of In what an Order made at the Assizes, grounded Cases. on an Agreement, if the Plaintiff refuses to stand to it, the Court will grant a new Trial

Trial. *Pasch. 15 C. 2. B. R. Howel versus Smith, 1 Keb. 478.*

A Motion for a new Trial on Suggestion of a Deed inrolled suddenly trumped on the Defendant at the Assizes, whereby he suffered a Verdict against him, whereas there was no such Deed ever inrolled; but the Court would not grant it, although there was no Remedy against any of the Parties for Forgery or Perjury. *Mich. 15 Car. 2. B. R. Noy versus Tucker, 1 Keb. 568.*

It was insisted upon as a Rule, that nothing shall be a Ground to direct a new Trial to avoid a Judgment at Law, that would not be Ground for a Bill of Review to reverse a Decree; and a Confession subsequent to a Decree is no Ground for a Bill of Review. *1 Ch. Cases 43.*

The Court said they would hardly grant a new Trial where a Verdict might become Evidence in a criminal Cause. *Mich. 11 W. 3. Richardson versus Williams, Cases B. R. 319.*

Curia: If there be Evidence of both Sides, and Verdict against the Strength of Evidence; if such Trial be not peremptory, there ought not to be a new Trial. General Causes of new Trials are want of due Notice, Practice with, or Misdemeanors of the Jury, in either Party or their Agents, the Absence of some material Witness, which they could not then have, Verdict against Evidence, excessive Damages, &c. *Hil. 12 W. 3. B. R. Anon. Cases B. R. 439. Vide 2 Vern. 578, 414.*

Eq. Abr. 378. 11 *Mod.* 1. 10 *Mod.* 202.
3 *Mod.* 264.

In an Ejectment tried at Bar, the Question was, Whether the Defendants were in Possession of all or any Part of the Premises in Dispute. The Evidence that was given to prove the Possession was uncertain; the Jury found that the Defendants were not in Possession of all or any Part of the Premises. It was suggested for a new Trial, that this Fact is found by the Jury expressly against Evidence; but the Motion was denied, and the Court in delivering their Opinion, laid it down as an undoubted Truth, that if the Evidence be doubtful, no new Trial shall be granted, but it must be contrary to Evidence. *Hil.* 12 *Geo.* 2. *B. R. Dormer versus Parkhurst.*

The Reason why one Trial in Ejectment will not bind the Inheritance, is of the Nature of Action, and not from Action. Any Rule in Law, that one Trial shall not bind the Inheritance, for it would in a proper Action; but a Decree in Chancery is final: Therefore one Trial upon an Issue directed, may settle the Right. 1721, *Lomax versus Rider.*

Upon an Issue *Deviseavit vel non*, which was found against the Heir at Law, it was urged for a new Trial, that it was the Rule of the Court, not to bind the Inheritance without two Trials at least; and in Case of an Ejectment at Law, the Party is at Liberty to try his Fortune *twice quoties*, &c. But the Lord Chancellor said he knew of no such Rule, and as to the Case of an Ejectment at Law, he said

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the antient Course of Law was otherwise, for in a real Action, as Affise, &c. Recovery therein was always a Bar to a new Affise, and the Party grieved was put to a Writ of a higher Nature, &c. and the trying *toties quoties*, upon an Ejectment, is owing to the new Practice of trying Titles that way, wherein the Parties being fictitious, one Trial cannot be made Use of as a Bar to another. And a new Trial was denied, no Affidavit or Certificate of the Judge being produced. *Mich. 4 Geo. 2. Canc' Anon. Vide 1 Sid. 144. 2 Salk. 644. 2 Jon. 225. 2 Vent. 351.*

Hard Action.

In an Action upon the Case for the Defendant's negligently keeping his Fire, whereby Plaintiff's House was burn'd, a Verdict passed for the Defendant; and tho' *Holt C. J.* declared he was not satisfied with it, the Court, after Debate and Consideration, refused to grant a new Trial, because it was a hard Action. *Mich. 7 W. 3. B. R. Smith versus Frampton, 2 Salk. 644. 1 Ld. Raym. 62, 63. 5 Mod. 87.* But in a like Action, after a Verdict had passed for the Plaintiff, a new Trial was granted. *Pasch. 5 Ann. B. R. Dunkley versus Wade, 2 Salk. 653.*

The Lessor brought an Action of Trover against the Lessee for Trees cut down, and the Jury gave a Verdict for the Defendant; but because the Lessee cut down the Trees in trenching, whereby the Plaintiff had a greater Advantage, the Court would not grant a new Trial.

In an Action for 50 *l.* Penalty, for selling half a Pint of Cherry Brandy; the
Fact

Fact was proved upon the Trial to be done by the Defendant's Wife; but several Circumstances appeared to shew that she was unwarily drawn into it by false Pretences. *Eyre C. J.* who tried the Cause, directed the Jury to find for the Plaintiff, but they found for the Defendant, contrary to Evidence. A new Trial was moved for, but denied, the Action being hard, and the Case having been represented to the Commissioners of the Excise, they refused to direct a Prosecution. *Pasch. 6 G. 2. C. B. Philips Qui tam versus Scullard.*

In an Action upon the Statute of Hue and Cry, a new Trial was granted after a Verdict for the Defendant. 2 *Salk.* 644. 1 *L. Raym.* 62, 63.

Upon *Non assumpsit* pleaded, the Jury Defence found for the Plaintiff, though the Defendant gave good Evidence of her being avoid a married; and the Court refused to grant a just Debt. new Trial, because there was no Reason why the Defendant, who lived here as a Feme Sole, should set up Coverture to avoid Payment of her just Debts. *Hil. 8 W. 3. B. R. Dcerly against The Dutcheß of Mazarine, 2 Salk.* 646.

On an Action of Debt against an Heir, upon the Bond of his Ancestor, the Defendant pleaded *Riens per descent*, but by omitting to produce a Settlement at the Trial, a Verdict was found for the Plaintiff; and the Court refused to grant a new Trial, because it was an honest Debt. 2 *Salk.* 647. 3 *Salk.* 361. *Holt's Rep.* 706, 707.

Criminal
Prosecu-
tions.

A new Trial will not be granted, where the Defendant is acquitted in criminal and capital Cases; but it may be granted where he is convicted. 1 *Lev.* 9. *Vide Mansel's Case*, 1 *And.* 103. 1 *Sid.* 42. 1 *Ld. Raym.* 63.

Upon an Indictment for Perjury, the Witnesses who could prove it, were arrested for great Sums, as they were going to the Assizes, and so could not be present at the Trial; and thereupon the Defendants were acquitted. Upon Affidavit of this Matter, the Court was moved for a new Trial, he for whose Benefit the Perjury was, being found guilty of contriving this Arrest; but all the Court except *Windham J.* said they could not grant a new Trial in Perjury, because the Record of the Acquittal was before them; and they said that all the Justices of *Serjeants Inn* in *Fleet-Street* were of the same Opinion. But *Windham J.* said, that the Books are only, that the Life of a Man is not to be put in jeopardy twice for one and the same Offence, but this is a Crime which doth not reach Life; and therefore he was for extending Justice, that the Innocent might not be punished for the Guilty, especially when the Means by which the Party escaped Justice, is a greater Crime than the first. And *Kelyng C. J.* in a MSS Report of his, says, that *Hyde, Twisden*, and himself, agreed that no Trial ought to be where the Party was once acquitted for any Crime that concerns Life or Member, or which would make the Party infamous; and that the Mischief might be very

very great, if the Party should be put to a new Trial, for then his Adversary would see where he failed, and might use ill Means to prove what he failed in before; and that upon Search, no Precedent was found that ever any new Trial was granted in such Case, except two, in the Time of the late Troubles, which *Tweissen J.* said were by Consent, and the Court did not regard those Precedents, as differing from all in good Times. *Mich. 15 Car. 2. Rex versus Fenwick, 1 Sid. 149, 153. 1 Lev. 124.*

Upon an Information in the Nature of a *Quo Warranto* against the Defendant, for exercising the Office of a Mayor of *Shaftsbury*, the Jury gave a Verdict for the Defendant. *Price Bar.* who tried the Cause, certified, that in his Opinion, the Verdict was against Evidence. Upon a Motion for a new Trial, it was debated whether a new Trial ought to be granted in Case of an Information, which it was insisted was a criminal Proceeding; the Court was equally divided; whereupon the rest of the Judges were advised with, but they being also equally divided, no new Trial was granted. *Mich. 5 Geo. B. R. Rex versus Bennet. Vide 1 Sid. 50. 1 Keb. 638. 2 Keb. 403, 179, 226, 404. Comb. 58, 75. 8 Mod. 289. 1 Show. 336. 12 Mod. 8, 9. 1 Ld. Raym. 63. 2 Salk. 646. 3 Salk. 362.*

Gould J. No Case can be instanced of a Verdict's being set aside (and a new Trial granted) where there had been a Defence, Where no new Trial shall be granted,
N 3 and
after a Defence made at the first Trial.

and full Evidence, except it were for Matter discovered after the Trial.

Where a Man has a Matter of Defence, and knowing thereof, goes to Trial, and puts the Plaintiff to the Charge of proving his Issue, he shall never after, in Respect of that Matter, have a new Trial. *Mich. 13 W. 3. Watson versus Sutton, Cases B. R. 583, 584.*

In Cases of Default, in delivering a true Copy of the Issue, of due Notice, of a common Jury being returned instead of a special one, a new Trial has been denied, because the Defendant had made Defence. *2 Vent. 73. 2 Salk. 646. Cases B. R. 567.*

For one
where several De-
fendants.

In an Action for an Assault against three Defendants, two were acquitted and one was found Guilty; but, as the Judge certified, against Evidence. On Motion for a new Trial, the Court said it could not be granted at all; but the two Defendants consenting to a new Trial, and to quit their Costs, and the other Defendant consenting to pay Costs, a new Trial was granted against all. *Hil. 11 W. 3. Bond versus Spark & al, Cases B. R. 275. Mich. 5 Ann. B. R. Berrington's Case, 3 Salk. 362.*

Objections
to, and
Misde-
meanors in
the Jurors.

An Objection against a Juror, for which he might have been challenged, is no Cause for a new Trial. *Styl. 100, 129. 1 Vent. 30. 11 Mod. 119.*

Misbehaviour in the Country (as by the Plaintiff's delivering Papers to the Jury after they were gone from the Bar) is no Cause for a new Trial, though verified by

by Affidavits, unless indorsed on the *Po-
flea. Cro. Eliz.* 189, 411. 1 *Sid.* 235. In
Cases of giving the Verdict by Votes or
casting Lots. *Vide* 1 *Keb.* 811. *Comb.*
14. For giving the Jury more Money for
their Trouble than they ought to have.
1 *Vent.* 30.

The Sheriff returning a Jury contrary
to a Rule of Court, or committing any
such Irregularity to the Prejudice of either
Party, is a good Cause to set aside the
Verdict. 11 *Mod.* 1. 3 *Ch. Rep.* 42.
New Trial granted for Embracery, 2 *Vent.*
173. because the Foreman had declared
the Plaintiff should never have a Verdict,
whatever Witnesses he produced. 2 *Salk.*
645. See more of these Matters, *Gro-
venor versus Fenwick*, 7 *Mod.* 156. 2
Salk. 650. *Herbert versus Shaw*, 11 *Mod.*
111. *Baker versus Niles*, *Rep. of Pract.*
in C. B. 66. *Parker versus Thornton*,
2 *Ld. Raym.* 1410.

A new Trial ought not to be granted Witness
for want of Evidence which the Party absent, or
might have had at the Trial, and had of ill
not; but if he can prove that En-Fame.
deavours had been used, but prevented by
some unforeseen Accident, as Sickness,
&c. it may be a good Cause for a new
Trial. *Mich.* 2 *Ann.* *Warren versus Fox*,
6 *Mod.* 22. *Vide* 1 *Keb.* 485. *Freem.*
80. *Cockcroft versus Smith*, 11 *Mod.*
52. The Witness should make Affidavit
of what he knew, that the Court may
judge of it, whether it be material. 2
Salk. 645.

That the Defendant arrested and imprisoned one of the Plaintiff's Witnesses till the Trial was over, is a good Cause for a new Trial. *Mich. 6 Ann. B. R. Davies versus Daveril, 11 Mod. 141.*

The *Onus Probandi* lying on the other Side, and the Witnesses being Sea faring Men, a new Trial was denied. *December the 1st, 1718, India Company against Ekins.*

If a Witness who proved a Bond at a Trial, which is suggested to have been forged, had been convicted of Perjury, or the Party of Forgery, it is a good Cause for a new Trial. *2 Vern. 578, 437.*

Judge not admitting Evidence, or admitting that which was no Evidence.

It is a good Cause to grant a new Trial, that the Judge who tried the Cause, overruled good Evidence, or admitted that which was no Evidence; and that though the other Party has Remedy by Bill of Exceptions. *6 Mod. 307, 242. 7 Mod. 53, 64.*

New Matter discovered since.

On a Trial by Proviso in an Action against an Administrator, who had pleaded *Plene Administravit*, the Defendant being put to prove the Payment of 50*l.* before the Plaintiff's Original, and not being able so to do, a Verdict went against him; but afterwards finding the Note, whereby his Witness was enabled to prove that Matter, on a Bill in Chancery, a new Trial was granted. *Chanc. Prec. 193, 194. 2 Vern. 437. Eq. Ab. 377. pl. 2.*

New Trial of an Issue denied upon Evidence discovered since the Trial, tho' it

it was urged for a new Trial, that one Trial ought not to conclude, especially where a Freehold is in Question, 21 Jan. 1717. *Episcopus Dunelm' versus Liddel.*

Motion for a new Trial, on Suggestion that the Defendant had made a Mistake upon the Trial of the Issue in a Point of Evidence, which would have encountered the Evidence given against him, and which Mistake had been discovered since the Trial. Motion denied, *Gibb.* 46. *Vide Hyon versus Ballard,* 7 *Mod.* 54.

If the Party have a Cause of Challenge, and knows of it before the Trial, and does not challenge, he shall not have a new Trial: *Contra*, if he had not timely Notice of it. *Herbert versus Skare,* 11 *Mod.* 119. *Antea* fo. 270.

New Trials are seldom granted by Excessive Reason of excessive Damages, in Actions Damages. for scandalous Words, or the like; nor by Reason of the Smallness of Damages, unless there be a Contrivance; and in some Cases the Court have increased the Damages. 1 *Keb.* 133. *pl.* 59. 1 *Lev.* 97. 2 *Jones* 200. *Comb.* 357. 2 *Barnard. Rep. in B. R.* 177. *Trin.* 13 G. 2. C. B. *Lord Gower versus Heath,* 2 *Salk.* 647. But if it plainly appears that the Damages are unjustly excessive, as if on an Action for a Promissory Note of 20 *l.* the Jury should give 2 or 300 *l.* Damages; there I apprehend a new Trial may be granted.

Against Evidence, and where the Judges Certificate necessary.

On a Motion for a new Trial, because the Verdict was against Evidence, Affidavits of that Matter is not a sufficient Foundation to grant it, but the Certificate of the Judge who tried the Cause. *Hill versus Hill, Select Cases in Chan.* 17. *Soam versus Danvers, ibid.* 20. *Vide* 3 *Keb.* 351, 352, 398. 12 *Mod.* 336. *Styl.* 462. But a new Trial was directed, although there was no Judge's Certificate, nor no Evidence, but what was in the Party's Power at the Time of the first Trial; but one Part of the Order directed that the former Verdict should not be given in Evidence at the new Trial. *Feb.* 16, 1726. *Floyer versus Johnson.*

Bill by the Devisee of Land against the Heir at Law, to establish the Will of the Testator; and upon the Hearing, the Issue *Deviseavit vel non*, was directed to be tried at Law; and afterwards upon the Trial, there was a Verdict for the Will. And now the Defendant's Counsel moved for a new Trial, without any Certificate from the Judge, or Affidavits relating to the Trial; but insisted it was a doubtful Case, and Evidence both ways; and that by the Rule of the Court, the Inheritance of an Heir at Law shall not be finally bound and concluded by one Trial. *King C.* said, he knew of no such Rule of Court, and he saw no Reason for it, and denied the Motion; but gave the Defendant Leave to apply to the Judge, and if he was not satisfied with the Verdict, they might move

move again upon such Certificate. *Mich.*

4 *G.* 2. *Durant* versus *Durant*.

As to other Matters in general, for Granting new Trials, *vide* 40 *E.* 3. 15. *Bro. Issue join. pl.* 5. *Enquest, pl.* 4. 1 *Ch. Ca.* 43. 2 *Freem.* 178. 2 *Vern.* 75, 240. 3 *Salk.* 273, 625, 645, 648. 12 *Mod.* 233. 2 *Vern.* 437. *Chan. Prec.* 193. *Eq. Ab.* 378. 11 *Mod.* 118, 119, 206. 1 *Peer Will.* 213.

A new Trial granted after a Trial at When to Bar. 1 *Sid.* 235. 2 *Vern.* 437. *Ch. Prec.* be moved 194. 12 *Mod.* 93, 128. 1 *Sid.* 58. *pl.* 26. for. *contra*, unless Corruption or Misdemeanor in the Jury. 1 *Sid.* 58. *pl.* 26. 2 *Jones* 224, 225. 2 *Salk.* 648. *Carth.* 507. *Ld. Raym.* 514. *Hil.* 12 *Geo.* 2. *Dormer* versus *Fortescue.* 7 *Mod.* 37. 2 *Salk.* 650. *Styl.* 462, 466. 2 *Ld. Raym.* 1360. 2 *Peer Will.* 563. 1 *Peer Will.* 213. 2 *Salk.* 653.

Whether after a Nonsuit. 3 *Keb.* 811. *Rep. of Pract. in C. B.* 63.

Not after Motion in Arrest of Judgment. 2 *Salk.* 647. 12 *Mod.* 158.

Not regularly after a View. 11 *Mod.* 1.

Not in an inferior Court, nor after the Party has rested a long Time. 7 *Mod.* 84. 2 *Salk.* 650. 3 *Salk.* 363. 8 *Mod.* 264. *G. Hist. C. B.* 38.

A second new Trial when it may be granted. 2 *Salk.* 649. 6 *Mod.* 22.

On a Motion for a new Trial, the Verdict being against Evidence, it was objected, that there being a special Verdict, no new Trial could be granted, for
by

by the Counsel's signing the special Verdict, they had consented to it; the Lord Ch. Bar. said, that the Jury found their Verdict contrary to his Opinion and Direction; and he thought the special Verdict no Hindrance of granting a new Trial; for if there was a Matter of Law, the Counsel must sign the Notes, but may waive it afterwards. *Price* Bar. said, that the Lord Ch. Bar. being of Opinion that the Verdict was against Evidence, he thought there must be a new Trial, and the Counsel having signed the special Verdict does not alter the Case, for it is only saving a Matter of Law, and is *ex abundanti*, and does not help, when the general Part of the Verdict is wrong; but then if the general Part of the Verdict is against the Plaintiff again, he will still have the Benefit of arguing the Point of Law, which will be a Hardship upon the Defendant; and therefore the Plaintiff ought to come into Terms. *Page* Bar. thought there must be a new Trial; but if the Plaintiff had put the Defendant to the Charge of arguing the special Verdict, it would then have been too hard, but now no more Expence than if it had been a general Verdict. *Namniock* versus *Farewell*.

Where there is a new Trial directed, the Party, that moves for it, must pay the Charge of the former, and deposit Money for the Charge of the new Trial. *February* 17, 1724. *Lord St. George* versus

versus *Martin*. But this should be understood, where the new Trial is granted on the Merits of the Cause, and not where it is granted for Irregularity. *Cases B. R.* 370. In many Cases the Court in granting a new Trial, will order that the former Verdict shall stand as a Security, for otherwise the Party, against whom it passed, might spirit away the Evidence, on whose Testimony it was obtained; and so without any Corroboration of his Right, deprive him of the Benefit of his Verdict. *Cases B. R.* 439.

Of

Of various Methods of Trying Matters of Fact.

THOUGH Matters of Fact are most generally triable by Juries, yet in some Cases they are determinable by other Kinds :

Trial by
Record.

As if an Action of Debt, or a *Scire Facias* be brought upon a Judgment; or if a Defendant pleads that the Plaintiff is outlawed, or that the Plaintiff formerly obtained a Judgment against him for the same Debt; the Party against whom the Record is pleaded, shall not be admitted to contradict any Thing that is contained in the Record; for the Records of a Court of Record are of that Authority and Credit in the Law, that no Averment, Plea or Proof shall be received against them; but the Party must either alledge some Matter, which admitting the Record and the Truth of it, avoids the Effect of it, or he must say that there is no such Record: then the other Party averring that there is such a Record; *this is an Issue in Fact, and shall be tried by the Record itself, and not by a Jury; and if the Party whose Action or Defence was grounded upon such a Record, produces the Record he has pleaded, Judgment shall be given accordingly, for every Thing contained in the Record shall be taken for an undeniable Truth.

Trial by
Inspection.

If upon an Issue in Fact the Question be, whether one of the Parties was an Infant

Infant under the Age of twenty-one Years at the Time of his doing some particular Act: this Question shall in some Cases be tried by a Jury, and in some Cases by Inspection of the Judges. If in an Action the Defendant pleads that he was an Infant at the Time of the Debt contracted, and the Plaintiff says he was of full Age, this Issue shall be tried by a Jury.

But if a Man brings a Writ of Error, to reverse a Fine or common Recovery, for that he was under the Age of twenty-one Years when he levied the Fine or suffered the Recovery; or brings an *Audita Querela* to reverse a Recognizance or Statute-Merchant, or Staple for the same Reason, and Issue is joined upon that Matter, so that the Question is, whether he was of full Age or not; this shall be tried by Inspection of the Judges, and not by a Jury, 9 Co. 30. b. for these Things which Judges of Record do as Judges, shall not be tried by a Jury; and the Reason is, because the taking a Fine, Recognizance, &c. are judicial Acts, and taken by a Court or Judge, and the Law will not give Credit to any Averment so derogatory to the Honour of those, who are presumed to act with the greatest Integrity, and will admit of no Evidence less than that of Sense, in a Matter of so high a Nature. 1 Inst. 380. b. But in this Case the Party must bring his Writ of Error, or *Audita Querela*, and be inspected during his Nonage, and if it be recorded that he is within Age, the Fine, &c. may be reversed after he attains his

his full Age. 1 *Sid.* 322. *Hob.* 224. On Trial by Inspection, the Judges may inform themselves by other Proof, as by the Oath of the Infant, the Affidavits of others, Church-books, &c. 2 *Rol. Abr.* 573. *Stile* 456. 1 *Vent.* 69. In all Cases where the Matter may be tried by the Inspection, Examination or Discretion of the Judges, they may refuse to try it, and compel the Party to try it by a Jury. 2 *Rol. Abr.* 573. *pl.* 9. *Bro. Trial* 60. In an Appeal of Maihem, the Court, at the Prayer of the Defendant, may adjudge upon the View, a Maihem, or no Maihem; and this Trial shall be peremptory to the Parties. 2 *Rol. Abr.* 578. *F. pl.* 1, 2. Ideocy shall be tried by Inspection, for that may be discerned, and so cannot Lunacy *Skin.* 5.

Trial by
the Bi-
shop's Cer-
tificate.

Legality of Marriage, general Bastardy, Excommunication and Profession, are triable by the Certificate of the Bishop of the Diocese. 1 *Inst.* 74. *a.*

But where a Marriage *de facto* is sufficient, and the Legality or Illegality not material, it shall be tried by a Jury. 2 *Salk.* 437.

Special Bastardy shall be tried by a Jury, as where it is pleaded that the Demandant was begotten between *J. S.* and *A. G.* and born before Espousals, and afterwards Espousals took Effect between them; for if this were to be tried by the Bishop, he would certify the Demandant to be lawful, being so by the Spiritual Law, but not by the Common Law, and as the Suit touches a temporal Inheritance, it must be determined

mined by the Common Law. *Vincer, Tit. Trial, 42. P. 45. pl. 23.*

The Customs of *London* shall be tried Trial of by the Mayor and Aldermen, and certi- the Ca- fied by the Mouth of the Recorder. 9 *Co. Items of 21. l. 1 Inst. 74. a. 2 Rol. Abr. 579. London.*

The Certificate is not to be made in Writing, but the Recorder of *London* is to certify by Word of Mouth; for the Recorder is intended to be the best constant of the Custom, and he is supposed to be always in *London*; and therefore it is for the greater Dignity of the Court, that he attend in Person to give Satisfaction therein, than to make a Certificate, which will also require Witnesses to prove it, and consequently more Trouble and Delay in it, *Trin. 13 Car. B. R.* but not if the Custom do concern the Mayor particularly; *per Roll C. J. L. P. R. 251. Tit. Certificate. Bro. Tit. London, 17. 2 Jones 149.*

In certain Cases, as in Debt upon simple Contract, the Defendant at this Day Wager of may wage his Law; and if he will swear Law. that he owes not the Money, and eleven of his Neighbours, whom he must bring with him, will swear they believe what he has sworn to be true, he shall be quit of the Debt: And the Reason of this is, that as the Plaintiff has trusted to the Honesty of the Defendant, in lending his Money without Specialty, he ought to trust his Conscience in the Discharge. 1 *Inst. 294, 295.*

In Dower, or an Appeal brought by a Trial by Woman of the Death of her Husband, or parol in Proofs.

in an Affize brought by a Woman, who was the Wife of *B.* if the Tenant or Defendant pleads that the Husband is alive, the Trial shall not be by a Jury, but by the Justices, on Proof made before them, for the greater Expedition. 9 *Co.* 50. *l.* and in several other Cases, *Vide* 2 *Rel. Ab.* 572. *Viner, Trial*, 19, &c.

Trial by
Officers
of the
Court.

Sir *Thomas Seaton*, a Judge, brought an Action in the Exchequer against *J. S.* for calling him Traitor in the Exchequer, in the Presence of the Treasurer and Baron, to the Damage of 1000 *l.* in Contempt of the King, and Scandal of the Court, &c. And this was tried by Attornies of the Common Pleas, and of the Exchequer. 30 *Aff.* 19. *Bro. Trial*, 150. 9 *Co.* 32. *a.* 8 *H.* 6. *c.* 12.

A Woman brought an Action in the King's Bench against *A. B.* for bearing her as she was pursuing her Business in the King's Court; by the Command of the Judges, the Marshal made a Panel of People who had Stalls of Merchandize in the Hall. 43 *Aff.* 18. *Bro. Bille* 44.

Disseisin of an Office in the Common Pleas, or Rasure of a Record, shall be tried by Filazers and Attornies of the same Court. 11 *E.* 4. 2. *Bro. Trial*, 104. *Bille* 31.

Trial by
Battail.

Trial by Battail is an antient Method of Trial, and long disused, but not taken away or repealed.

The Issue in a Writ of Right, and an Appeal of Murder or Robbery, may be tried by Battail.

Thus

Thus much in general; what the Law is in Particulars, as to this Method of Trial, belongs not to this Treatise; but for the sake of Curiosity we shall give an Instance or two of it; one as set forth in the Year Book 1 H. 6. 6, 7.

In a Writ of Right, the Tenant joined Battle upon the mere Right by the Body of J. C. if God give him, &c. and the Demandant replied by the Body of his Freeman J. P. if God, &c. And the Champion of the Tenant was commanded to put a Penny in each Finger-stall of his Gauntlet, and after, the Champion of the Demandant the like, and a Day was given them to come to their Array; upon which they came, and the one was put on the one Side of the Court within, and the other on the other Side of the Court within, bare-headed, and kneeling: And *Babington* demanded of the Serjeants, if they knew any Thing to say, why the Battle should not be performed; who said No. *Per Curiam*, See that they are Freemen; and then the Chief Justice received their Gauntlets, and searched if there were in each Gauntlet five Pence, and found there were, viz. in each Finger-stall a Penny; and first he gave the one Gauntlet, with the five Pence, to the Champion of the Demandant, and after the other to the Champion of the Tenant; and asked the Champion of the Demandant, if he would perform the Battle; who said that he would, and demanded of the other the like, who said Yes: and demanded of the Serjeants, if they had mispleaded any Thing,

Thing, or were misruled by the Court, or had other Thing to say to retard the Duel; who said No. Whereupon he received the Gauntlets again, and ordered that the Battle should be made such a Day, &c. but at no Hour certain; and commanded one of the Champions to go to *St. Paul's*, to pray that God would give the Victory to him who had Right to the Land; and likewise commanded the other to go to *Westminster Church*, to pray as above; and commanded that they should not go together, nor come near the one to the other; and each found Sureties, by Pledges, to perform the Battle, but upon no Pain; and the Tenant first found, &c. and at the Day of Battle, the Demandant was demanded who appeared by Attorney; and *Paston* for the Demandant, by the Command of the Justices, rehearsed the Count, the Defence, and the Continuance, and the Names of the Champions, and prayed that the Earl of *Northumberland*, now Tenant, should be demanded, and the Demandant had his Champion ready at the Bar, vested in red Leather; and it was commanded that one should hold the red Target, and his red Bastion, at the Back of the Champion; and so it was, but his Head was not shaved, as the Head of an Approver or Appellor is, nor had his Bastion any Knob at the End, as the Bastion of an Approver has. But *per Martin*, it ought to have a Knob; and the Tenant was demanded solemnly to bring his Champion of the Manor of *T.* in the County of *E.*

or

or he should lose his Land from him and his Heirs for ever; and this was demanded three Times, and the Tenant made Default. Upon which *Cockain*, by the Advice of all the Justices, rehearsed the Count, the Defence, and all the Continuances, and the Names of the Champions; and awarded that the Demandant recover the Manor of *D.* to him and his Heirs for ever, quit against the Tenant and his Heirs for ever; and that the Tenant be amerced. And because he is a Peer of the Realm, that he should be amerced by his Peers, according to the Statute; and therefore the Court would not put it in certain. *Quod nota*, and *quaere* to what Purpose the Surety is; for the Champion of the Tenant was not demanded upon the Surety, as he who is let to Mainprise, is, &c. *Bro. Droit de reſto*, pl. 20. *Et vide* 17 *Aff.* pl. 1. 17 *E.* 3. 2. 9 *H.* 4. 3. 19 *H.* 6. 35. *Bro. Battle*, 1, 15. *Fitzh. Corone*, 1, 111. *Viner*, Tit. *Trial* 30.

Another was in 1571. and is thus related in *Grafton's Abridgment of the Chronicle of England*, fol. 214. Issue being joined in the Common Pleas, upon Battle, in a Writ of Right brought by *Simon Lowe* and *John Keme*, Demandants, against *Thomas Paramor*, Tenant, for certain Lands in the County of *Kent*; the Court assigned the 18th Day of *June* for the Battle, and for the Parties to bring in their Champions, against which Day there was made, in *Totbill-Fields* near *Westminster*, a great Court or Place built

built with Timber, Quarters and Boards, made in all Things like the Court of Common Pleas in *Westminster-Hall*; and at each End of the Court was erected a Tent. At the Day appointed, Sir *James Dyer* C. J. and the other Justices came and took their Places, attended by the Serjeants at Law, the Attornies and Officers of the Court. Directly before the Court was set out, a Plat of Ground forty Foot square, railed in and scaffolded round. When all Things were ready the Mainperners [Sureties] of the Champions were called into Court, and it was demanded of them whether the Champions were ready to deraign the Battle, who answered they were ready; then the Warden of the *Fleet* was called, and ordered to bring first the Champion of the Demandant, whose Name was ——— a Master of Fence, and he was brought out of one of the Tents in this Manner: Sir *Jerem Bowes*, accompanied with the Warden of the *Fleet*, fetching him out of the Tent, brought him along the Inside of the Rail, to the other End thereof, right before the Court; his Head, Legs, Feet and Arms, from the Elbow, were bare, and his Cloathing was of thin red Sandal: the Knight carried the Trunchion or Staff the Champion was to have fought with, which was about the Thickness of a Tipstaff, about an Ell long, and tipped with Horn, and behind the Champion his Custerel carried his Shield, which was of hard Leather; when the Knight and the Champion were at the nether End of the Rail

Rail, they made a low Bow to the Judges, then went on, and when they were come Half-way they made another Bow, and when they were come to the Bar, they made a third Bow, where they stood still, the Custerel standing behind the Champion, holding his Target somewhat higher than his Head; then the Champion for the Tenant being called, and brought by another Knight in like Manner, the Demandants were called, but making Default, and not appearing, the Court gave Judgment for the Tenant. *Vide Cro. Car.* 522.

Before the Conquest, in criminal Cases, Trial by the Accused might put himself on God Ordeal, and his Country, in which Case he should &c. be tried by a Jury of twelve Men, as at this Day; or he might put himself on God alone, presuming that God would deliver the innocent, in which Case he should be tried by Ordeal, with these Differences; if he was a Freeholder, he was to walk with his Feet and Legs naked, over nine burning Plow-shares; if of lower Degree, he was to walk in like Manner over the same Number of Vessels filled with scalding Water; if, in either Case, he escaped unhurt, he was acquitted; if not, he was condemned. But the Law, as to these Methods of Trial, is repealed by Act of Parliament. 9 *Rep.* 32.

There was also formerly a Method of Judicial Trial in some criminal Cases, by giving Mortel. the Accused a Morsel of Bread or Cheese, with this Prayer or Form of Words, *viz.*
 ' Let his Jaws be shut against the Creature
 of

‘ of hallowed Bread or Cheefe, which is
‘ forced upon him, for the Demonstration
‘ of Truth, let him be choaked, and in
‘ thy Name let it be cast up again sooner
‘ than swallowed; but if he be innocent,
‘ and knows nothing of the Crime, where-
‘ with he is charged, let him with Ease
‘ and Health swallow this Morsel, signed
‘ in thy Name.’ *Brady’s Hist. of Engl.*
66.

Concerning Challenges.

AS nothing more illustrates the Excellency of our Laws, in providing for impartial Juries, than the several Determinations of the Judges in Points of Challenges: though something has already been said on that Head; I believe the following Collection, which was made by a Gentleman of great Reputation in the Profession of the Law, will be very acceptable to the curious and learned Reader.

Of awarding the Jury Process, at first to an impartial Officer.

If the Plaintiff suggests that he him-
 self is Sheriff, or Cousin to the She-
 riff, (shewing how) and therefore prays
 Process to the Coroners, or suggests also
 that he is Cousin to some of the Coro-
 ners, (shewing in what Manner he is
 Cousin) and therefore prays Process to the
 rest of them, and the Defendant admits
 the Suggestion to be true, Process shall
 issue as the Plaintiff prayed; but if he
 denies it, the Denial shall not be tried,
 but it shall be entered, and Process shall
 go to the Sheriff himself, or to all the
 Coroners, as the Case shall be; and the
 Defendant shall not challenge the Array
 for any of these Causes, but he may for
 any other Matter. 14 H. 6. 2. Chall. Bro.
 89. 9 E. 4. 6. Chall. Bro. 82. 21 E. 4.
 51. Chall. Bro. 179. 4 H. 7. 2. Chall.
 O Bro.

Bro. 154. Vide 38 E. 3. 20, 25. Or for Kindred in a different Manner than was suggested; tamen quaere. 4 H. 7. 2. Chal. Bro. 154. Vide Moor 894. Hutt. 24.

Where there are two Sheriffs, and one of them is Party. *Vide antea fol. 42.*

Plaintiff The Array being quashed, for that it prays Pro- was favourably made by the Sheriff, the cess to one Plaintiff prayed Process to one of the Coroner, for that the other was of his because Counsel; the Attorney for the Defendant the other would not confess this Matter; wherefore is of his Counsel, the Court would not grant Process but to the Defen- both Coroners, for the Defendant may dant will have his Challenge if the Panel be favour- not confess ably made; but if the Plaintiff had said this. that the Sheriff was of his Affinity, or other principal Challenge, he ought to have Process to the Coroners; for this Matter comes of the Plaintiff himself; in the other Case, the Matter cannot be tried, but by the Confession of the Party himself. And in the first Case, if the Defendant had said that the Sheriff was not favourable, but indifferent, he should not have challenged for Favour, unless he had shewn Cause of later Time. 20 E. 4. 2. *Chall. Bro. 179.*

Awarded A *Venire* was awarded to the Sheriff, and at the Return it was entered *quod vice-* to the Co- comes *non misit breve*, and then the Plain- roners on tiff prayed a *Venire* to the Coroners, for Suggestion Consanguinity between him and the Sher- after Pro- riff, which was granted; at the Trial the cess to the Defendant made Default, and Judgment was Sheriff, and a *Vic'* for the Plaintiff. It was assigned for Er- *non misit* ror, that the Plaintiff having admitted the *breve* en- Sheriff- tered.

Sheriff to execute the Writ, could not have a *Venire* to the Coroners but for Cause *de puisne temps*; *sed non allocatur*; for nothing was done upon the first Writ, and it is not now material, the Defendant having made Default. *M. 43 Eliz. Willoughby versus Egerton, Cro. Eliz. 853.*

The Plaintiff suggested that the Sheriff was Cousin to the Defendant, and prayed a *Venire* to the Coroners; the Defendant denied the Challenge. *Curia*: The Challenge lies not in the Plaintiff's Part, if he misdoubt the Sheriff, he should stay till he is out of the Office. *Trin. 43 Eliz. Greenvil versus Dennis, Cro. Eliz. 844.*

The Plaintiff suggested that the Sheriff was of the Affinity of one of the Defendants, shewing how, and prays a *Venire Facias* to the Coroners, and, the Defendant not denying it, the Writ was awarded accordingly, and held to be well awarded; for though none of the Defendants may challenge the Array, because the Sheriff is of the Affinity of one of the Defendants; yet the Plaintiff ought either at the Trial to challenge the Array, and so delay himself, or he ought not to try it during the Time that he is Sheriff, which would be a great Delay. *P. 11 Car. Fox versus Shepherd, 2 Rol. Abr. 668.*

If in an Action by Baron and Feme, against several Defendants, the Husband suggests that the Sheriff is Cousin to the Wife, and that one of the Coroners is Servant to one of the Defendants, and

therefore prays Process to the other Coroners, so that neither the Sheriff nor that Coroner intermeddle, it may well be awarded. *Wimbish and Willoughby*; 2 *Rol. Abr.* 668.

If the Demandant says, that pending, &c. the Sheriff has espoused *E.* the Cousin of the Tenant, and prays the *Venire Facias* to the Coroners; yet it shall not be granted. 2 *E.* 3. 62. *b.* 2 *Rol. Abr.* 669. *pl.* 13.

Whether
on the
Suggestion
of the De-
fendant.

Process being ordered to the Coroners for a Default in the Sheriff, the Defendant said that one of the Coroners was Tenant to the Plaintiff, and prayed Process to the other; but he could not have it, until it be returned and a Challenge thereupon taken; *quod nota, & eadem Lex per Skip*, where such Challenge is taken against the Sheriff; yet it is otherwise used at this Day, if the Party will confess. 38 *E.* 3. 25. *Bro. Chall.* 52. The Defendant cannot, upon a Suggestion that the Sheriff is Cousin to the Plaintiff, have Process to the Coroners, for he may take Advantage of it by way of Challenge when the Jury appears, and the Plaintiff will only delay himself. 3 *H.* 7. 5. *Bro. Chall.* 153. *Brief* 237. *Office and Officer* 17. 14 *H.* 6. 1, 2. 2 *Rol. Abr.* 669. Nor upon a Suggestion that the Sheriff is Cousin to himself; for it is for his Advantage, and does not hurt him. *Jenk.* 115. *pl.* 28.

Must be a
Principal.

No Challenge for Favour can be shewed for Cause before the *Venire*, but only a principal Challenge. *Moor* 896.

In

In Ejectment, the Plaintiff suggests to the Court that he, the Sheriff and one of the Coroners were of the Livery to the Countess of Worcester, and therefore prays Process to the other Coroner, which on the Confession of the Defendant issued accordingly; and after Verdict it was insisted that the Suggestion did not contain a principal Challenge; *sed non allocatur*; for Misconveyance of Process is aided by 32 H. 8. and the *Venire* was awarded by Assent. Mich. 21 & 22 Eliz. Dyer 367. 5 Co. 36. b.

The Plaintiff suggested that the Sheriff was his Master, and therefore prayed Process to the Coroners, which, on the Defendant's Confession, was awarded. A Verdict being for the Plaintiff, the Defendant moved in Arrest of Judgment, for that a *Venire Facias* ought not to go to the Coroners upon any Suggestion, unless it be a principal Challenge; but the Court held it good, although he did not conclude his Challenge, *and jò favourable*. M. 39 & 40 Eliz. Cane's Case. Moor 470.

In Ejectment, the Plaintiff suggested that the Sheriff was his Lessor, and that B. one of the Coroners, was the Sheriff's Servant; and this being confessed, Process was awarded to the Coroners, *ita quod B. se non intromittat*. After Verdict it was moved that this was no principal Challenge, and therefore no Cause; but the Court thought it sufficient, because confessed, and because it was but a Misconveying of Process, which was aided by the

Statute. *Mich.* 42 & 43 *Eliz.* *Higgins* versus *Spicer*, *Moor.* 623.

In Ejectment, the Plaintiff suggested Consanguinity between the Lessor and the Sheriff, and this being confessed, Process was awarded to the Coroners, and afterwards the Challenge was held insufficient, and Process awarded to the Sheriff. *Hil.* 44 *Eliz.* *Bedforme* versus *Dandy*, *Hutt.* 25.

Ejectment on Suggestion that the Sheriff was Cousin to the Lessor, Process was awarded to the Coroners; but after Verdict, adjudged a Mistrial, not aided by the Statute, and Process awarded to the Sheriff. *Trin.* 14 *Jac.* 1. *Craedock* versus *Wenlock*, *Hutt.* 26. *Vide* 5 *Co.* *Bainkam's Case.*

Judgment was reversed upon a Writ of Error, for that on the Plaintiff's Suggestion and the Defendant's Confession, that the under Sheriff was the Plaintiff's Cousin, shewing how, Process was awarded to the Coroners, where by the Law it is not any principal Challenge; for the Sheriff himself might have executed the Writ. *Mich.* 17 *Jac.* 1. *B. R.* *Symonds* versus *Walsh*, *Cro.* *Jac.* 547. *Vide* *Harebottle* versus *Placock*, *Cro.* *Jac.* 21.

Judgment was stayed, because the *Venire Facias* was awarded to the Coroners, without any Suggestion at all of any Challenge to the Sheriff, &c. this is not aided by the Statute 21 *Jac.* 1. c. 13. *Et per Curiam*, it is not aided by the Statute 16 & 17 *Car.* 2. c. 2. though the Right
be

be here tried, and the Court cannot amend this Direction of Process to a wrong Officer; and they cannot examine the Truth, without a Suggestion. *Pasch. 28 Car. 2. B. R. Hancock versus Wayman, 3 Keb. 624.*

The Plaintiff made a Suggestion on the Roll, that in as much as the Brother of the Defendant was one of the Sheriffs, that therefore the Coroners might return the Jury. The Plaintiff said he would confide in the Indifferency of the Sheriff; but the Court said, the Suggestion being upon the Roll, and not denied, the Coroners must return the Jury. *Hil. 35 Car. 2. B. R. Lord North and Grey against Elliot, Skin. 102.*

Indifferency in the Sheriff, &c. and Impartiality in executing the Jury Process.

IT is a principal Challenge to the Sheriff, that the Sheriff is Plaintiff in the Action, and returned the Panel. *14 H. 6. 1, 2. Chall. Bro. 88.*

On an Indictment for a publick Nuisance to the Annoyance of the People of the County of *M.* it is no Challenge to the Array, that the Sheriff who made the Panel, is Sheriff of the County of *M.* for it is at the Suit of the King, and not of the People of the County. *19 Aff. p. 6. Bro. Chall. 107.*

On an Indictment for a Nuisance, to the Annoyance of the People of the County of *M.* the Sheriff of *M.* may make the Panel.

M. the Sheriff of M. may make

Sheriff Plaintiff, and Array impanelled by his Under-Sheriff, who was of his Fee and Robes, It was held to be a good principal Challenge to the Array where Lord *Clifford*, Sheriff in Fee of the County of *Westmoreland*, was Plaintiff, that the Array was impanelled by *R.* his Under-Sheriff, who was of his Fee and Robes, though it was said that *R.* was Sheriff, and sworn to the King as Sheriff, and amerced as Sheriff. 9 *Aff.* 8. *Chall. Bro.* 79. *Fitz.* 8.

Sheriff Cousin to the Plaintiff, &c. It is good Challenge to the Array, the Sheriff is Cousin to the Plaintiff, 3 *H.* 7. 5. *Bro. Chall.* 153. 19 *H.* 8. 7. or to his Wife. *H.* 12 *H.* 6. *Fitzb. Chall.* 159. And where the Defendant challenged the Array, for that it was made by the Sheriff who was Cousin to the Plaintiff, though it was answered the Array was made by *A.* the Bailiff of the Hundred of *D.* who is known and sworn, and that the Sheriff did not intermeddle, but only brought in the Return; yet the Array was quashed, and a Writ was awarded to the Coroners. Afterwards *Burton* said, that the Array was good. 31 *Aff. p.* 7. *Chall. Bro.* 157. *Fitzb.* 149. It is a good Challenge to the Array, that the Under-Sheriff who made it, is Grandson to the Plaintiff's Brother. 19 *H.* 8. 7. *Bro. Chall.* 1. *See vide* 21 *E.* 4. 24. *Bro. Chall.* 181.

Sheriff Cousin to both Parties.

The Defendant challenged the Array, because the Sheriff was Cousin to the Plaintiff, which was confessed, but then it was said that the Sheriff was as near of Kin to the Defendant, and upon this it was demurred, and by Advice the Array

was

was quashed. *Mich* 25 *Eliz. C. B. Audeley versus Suttrel, Cro. Eliz.* 23.

The Plaintiff challenged the Array be- Sheriff
cause the Sheriff who made it was Cou- Cousin to
fin to the Tenant in the ninth Degree; the De-
and adjudged he may, if he can shew fendant in
how he is Cousin, though never so far the ninth-
removed. 21 *E. 4.* 75. And notwith- Degree.

standing the Tenant was seised in Right of his Wife, to whom the Sheriff was not inheritable; for by Reason of Consanguinity he shall be intended favourable; and though he cannot inherit the Land demanded, yet he may inherit other Land, as Heir to the Defendant. *Trin.* 14 *Eliz. Vernon versus Manners, Plowd.* 425.

In Ejectment, that the Sheriff is Cou- Sheriff
fin to the Lessor of the Plaintiff, is a Chal- Cousin to
lenge to the Favour only; but if it be a- the Lessor
verred that the Lease is made to try the of the
Title, and that the Action is carried on at Plaintiff in
the Expence of the Lessor, and it so ap- Ejectment.
pears by Proof to the Court, then it is a principal Challenge. *Trin.* 16 *Jac. C. B. Eyre against Banister, Moor* 894. *Vide Cro. Jac.* 21. 547.

Attaint upon a false Oath made in Re- Sheriff
plevin, where the Defendant made Conu- Cousin to
sance as Bailiff to one *Hussey*, the Plain- one under
riff surmised that the Sheriff was Cousin whom the
to *Hussey*, and therefore prayed Process Defendant
to the Coroners; but denied, for *Hussey* made Co-
is no Party to the Attaint, and this is but nusance as
Matter of Favour. *Mich.* 29 *Eliz. Goulds.* Bailiff.

42.

Sheriff It is a principal Challenge to the Array, &c. Son- that the Sheriff or Bailiff of a Franchise, in-law of who made it, has married the Daughter of the Plaintiff or Defendant, for his Issue may inherit, which induces Favour. 9 *E. 4.* 46. *Chall. Bro.* 85. *Fitzh.* 57. 22 *E. 4.* 2. *Chall. Bro.* 186.

Plaintiff It is a good Challenge that the Plaintiff married has married the Sheriff's Cousin, if it be Sheriff's alledged that she is alive. 10 *H. 7.* 7. Cousin, or *Bro. Chall.* 218. It is a good Challenge the Sheriff, to the Array, that it was made by a Bailiff, or Bailiff who married the Plaintiff's Cousin, other Officer, the and had Issue by her, though he did not Plaintiff's shew in what Manner she was Cousin; and Cousin. it was found there was no Default in the Bailiff. 29 *Aff. p.* 2. *Chall. Bro.* 131. *Fitzh.* 144.

Bailiff. It is a good principal Challenge to the Array, that it was made by the Bailiff of Sir *A.* who had married *A.* Daughter of *E.* Sister of *K.* Mother of the Father of the Plaintiff (so that *A.* was Daughter of *E.* who was Aunt of the Plaintiff's Father) if the Defendant alledge that the Bailiff had Issue alive by *A.*, or that *A.* is alive; for his Wife or Child may be Heir to the Plaintiff, though he himself cannot. 22 *E. 4.* 2. *Bro. Chall.* 186.

Coroners. The Panel was returned by the four Coroners, and the Array was challenged, for that one of the Coroners was of Affinity to the Plaintiff, tho' it was said that the Array was made by two of the Coroners, and that he did not intermeddle; yet as the Return was in the Name of the four Coroners

Coroners, it was to be presumed that the Panel was made by all of them, and therefore the Array was quashed, and a Writ sent to the three Coroners; so that the fourth should not intermeddle. 31 *Aff.* p. 20. *Chall. Bro.* 137. *Fitzb.* 124. *See* vide 12 *Aff.* p. 36. *Chall. Bro.* 101. *Fitzb.* 114. 26 *Aff.* p. 21. *Chall. Bro.* 116. *Fitz.* 133.

The Plaintiff challenged the Array, for that the Sheriff was Cousin of R. one of the Defendants; but in shewing how it appeared that the Sheriff was Cousin of R.'s Wife; yet the Court held the Array quashable, for either Way it is a principal Challenge; but because it was not alleged that the Sheriff was Cousin, &c. at the Time the Panel was arrayed, the Challenge was not allowed; for it might be that R. married his Wife after, and then the Panel was indifferently made. *Mich.* 29 *H.* 8. *Marshal* versus *Eure*, *Dyer* 37. *b.*

It is a good principal Challenge to the Plaintiff Array, that the Sheriff had baptized the Godfather Son and Heir of the Plaintiff. 4 *E.* 4. 11. to the Sheriff's Child, or the Sheriff to the Plaintiff's. *Chall. Bro.* 163. *Fitzb.* 51. It is a good Challenge, that the Plaintiff is Godfather to the Sheriff's Son, without saying that the Child is yet alive; but a Challenge for that the Plaintiff had married the Sheriff's Cousin is not good, without saying that the Wife is alive; for there the Affinity is determined. 10 *H.* 7. 7. *Bro. Chall.* 218.

The Array was quashed, because the Sheriff Sheriff was Tenant to the Defendant when Tenant to the Defendant

the Array was made, and Process ordered to the Coroners, unless the Plaintiff could shew that the Sheriff had aliened the Lands afterwards, *& sic de consimilibus*, that are Matters of Fact; but if the Array be quashed, for that it was made favourably by the Sheriff, the Process shall never go back to this Sheriff; for it shall be intended that the Favour continues. 15 H. 7. 9. *Chall. Bro.* 78. *Fitzh.* 174.

Sheriff In Replevin the Defendant made Cognizance as Bailiff to *A. L.* and the Array
 Tenant to *A. L.* as was challenged, for that the Sheriff was
 Bailiff, to Tenant to *A. L.* and within his Distress;
 whom the but the Challenge was disallowed, for *A.*
 Defendant *L.* is not Party, nor is Aid prayed of him.
 makes 9 H. 7. 23. *Bro. Chall.* 158. *Vide* 10 E.
 Cogni- 4. 12. *Chall. Bro.* 168. *Fitz.* 58. 15 E.
 zance. 4. 18. *Bro. Chall.* 68.

Array That the Array was made by a Tenant
 made by a of the Plaintiff's Uncle, and impanelled by
 Tenant of his Device and Counsel, is no principal
 Plaintiff's Challenge, because the Uncle is no Party,
 Uncle. unless they had been procured to find a-
 gainst the Truth of the Fact. 12 *Ass.*
p. 23. *Chall. Bro.* 100. *Fitzh.* 10. *Sec.*
 15 E. 3. *contra*: *Postea* impanelled by a
 Maintainer.

Sheriff In a *Monstrans de Droit*, the Attorney
 Tenant to General challenged the Array, because the
 both Plain- Sheriff was Tenant to the Plaintiff, which
 tiff and was held to be a good Challenge; the
 Defendant Plaintiff pleaded to the Challenge, that
 the Sheriff was also Tenant to the Queen,
 intending thereby to make him indiffe-
 rent; as where one Party challenges for
 Consanguinity, if the other Party shews
 that

that the Sheriff or Juror is also Cousin to the Challenger, he is thereby become indifferent. But the Court was against the Challenge, because of the Interest of the Heir; and therefore the Array was quashed. *Pascb. 41 Eliz. Lord Hundsdon's Case, Moor 553. Cro. Eliz. 663.*

It is no principal Challenge to say that Defendant the Defendant is Tenant to the Sheriff Tenant to who made the Array, for the Lord is in the Sheriff. no Danger from his Tenant; wherefore the Party concluded to the Favour. 27 *Aff. p. 28. Chall. Bro. 121. Fitzb. 138.*

On an Indictment for purchasing three Sheriff manors by Champerty, the Array was purchases challenged and quashed, and Process award- a Parcel ed to the Coroners, for that the Sheriff of the had purchased one of the Manors, though Lands. not of the Defendant. 44 *E. 3. 38. Chall. Bro. 22. Fitzb. 98.*

A Challenge to the Array, for that the Sheriff's Son-in-Law of the Sheriff had, pending Son-in- the Writ, purchased Part of the Land, was Law had disallowed, there being no Partiality purchased charged or found in the Sheriff. 21 *E. 3. Part of the Land, pending the Suit.* 5. *Bro. Chall. 53.*

The Array was challenged and quashed for that it was made by the Defendant's Array Bailiff of a Liberty. 26 *Aff. p. 22. Chall. made by Bro. 117. Fitzb. 134. Bridges:* In an the Defen- Action brought by a Prebendary, it is no dant's Bai- Challenge to the Array, that it was made liff of a by the Bailiff of the Dean and Chapter Liberty. of which he is Prebendary; for the Action is brought by a private Person, and not by the Dean and Chapter. *Fermey:* But in

The Impartiality of

an Action brought by the Dean and Chapter, it is a good principal Challenge. 21 *E. 4. 1. Chall. Bro. 180. Fitzh. 60. Hob. 87.*

Sheriff, It is a good Challenge that the Array
 &c. of was made by the Bailiff of R. who is of
 the Party's the Defendant's Fee and Robes. 8 *Aff. p.*
 Fee and 23. *Chall. Bro. 95. Fitzh. 7.* And so it
 Robes. is that the Sheriff is of the Plaintiff's Fee,
 and that the Array was made at the De-
 vice of the Party. 20 *Aff. p. 10. Chall.*
Bro. 108. Fitz. 15.

Under- The Array was challenged, for that the
 Sheriff of Under-Sheriff was of the Plaintiff's Robes;
 Plaintiff's the Sheriff being examined, said, that he
 Robes, but delivered the Writ to his Deputy, who
 did not in- made a Precept to the Bailiff of the *Wa-*
 termeddle. *pentake*, who was Bailiff of the Guilda-
 ble, and he made the Array and returned
 it, and that the Under-Sheriff did not in-
 termeddle; wherefore the Array was held
 to be good. 26 *Aff. p. 56. Chall. Bro.*
119. Fitzh. 136. Et vide 28 Aff. p. 16.
Bro. Chall. 124. It is a good Challenge to
 the Array that the Sheriff dwells with the
 Plaintiff, and is of his Robes. 38 *E. 3.*
 25. *Bro. Chall. 52.*

Sheriff of It is a good Challenge to the Array,
 Plaintiff's that the Sheriff is of the Plaintiff's Robes,
 Robes, and though the Array was made by the She-
 Panel riffs Bailiff, without the Sheriff's know-
 made by ing who were impanelled; for the Bailiff
 his Bailiff. being the Sheriff's Officer, shall be pre-
 sumed to be favourable also. 44 *E. 3. 44.*
Chall. Bro. 24. Fitzh. 96. Et vide 45
Aff. p. 1. Bro. Chall. 148.

That

That the Plaintiff is Servant to the Sheriff, and has Robes of him, is a Challenge to the Favour; but that the Sheriff is Servant to the Plaintiff, is a principal Challenge; for the Servant is at the Command of the Master, but the Master is not at the Command of his Servant.

21 E. 4. 67. *Bro. Chall.* 183.

The Array was challenged and quashed, for that it was made by *J. B.* who was aiding and of Counsel with the Plaintiff. And the Sheriff was ordered to make the Array by another Officer. 53 *Aff. p.* 12. *Chall. Bro.* 139. *Fitzb.* 126.

Array made by one who was aiding, and of the Plaintiff's Counsel

In Attaint the Array was challenged, for that it was made at the Denomination of the Plaintiff by *J. W.* the Under Sheriff, who was the Plaintiff's Attorney in the first Action, and of his Counsel in this Attaint. The Court held this to be no principal Challenge, for his Warrant in the first Action is expired, and as to his being now of the Plaintiff's Counsel, the Law will not presume that he will act contrary to the Duty of his Office. *Quaere inde*, for it was agreed to be a principal Challenge, that a Juror was Arbitrator for the Party.

Under-Sheriff Plaintiff's Attorney in a former Action, and of his Counsel in this.

7 H. 7. 10. *Chall. Bro.* 156. *Fitzb.* 66.

The Array was challenged, for that it was made by the Bailiff of the Hundred of *C.* at the Devise of one *W.* who was of the Plaintiff's Counsel, and it was found that the Panel was made in a favourable Manner for the Plaintiff, as to one of the Defendants; wherefore the

Panel made at the Devise of one who was of the Plaintiff's Counsel.

Array

Array was quashed. 43 *Aff. p.* 36. *Bro. Chall.* 146.

A Juror put in at the Denomination of either Party.

It is no Challenge to the Poll, that any Person was impanelled at the Denomination of either Party, but to the Array; for if any one Man be put into the Panel at the Denomination of either Plaintiff or Defendant, the whole Panel shall be quashed. 49 *Aff. p.* 1. *Chall. Bro.* 25, 150. *Fitzb.* 100. 7 *H. 4.* 10. *Chall. Bro.* 36. *Fitzb.* 85.

Array made at the Denomination of the Party.

The Defendant challenged the Array, for that it was made by *B.* a Bailiff, to whom the Sheriff had sent his Precept, at the Devise and Denomination of the Plaintiff. *Sharde*: You shall not charge any Thing by these Words, Devise and Denomination, &c. unless you say that it was made in an evil Manner, by Procurement, &c. The Party may challenge, *ut supra*, although the Return be made in the Sheriff's Name; for the Sheriff may write to a Bailiff of Fee, as of the Guildable, and not as to a Bailiff of a Franchise; and therefore he shall not make Mention of him in his Return, nor by his Default shall a *Non omittas* be awarded. The Challenge was tried. 27 *Aff. p.* 65. *Bro. Chall.* 123.

The Array was challenged, for that it was made by *B.* Bailiff of *W.* at the Denomination of the Plaintiff, and it was not allowed; whereupon the Defendant said that it was made at the Devise and Denomination of the Plaintiff, and in a favourable Manner. The Sheriff had returned the Array, as made by himself, but being

being asked, said that the Bailiff upon his Precept made it; therefore held to be a good Challenge. 28 *Aff. p.* 23. *Bro. Chall.* 127. It was held by all the Justices of the Common Pleas, that if the Sheriff put any Man into the Panel at the Denomination of the Plaintiff or Defendant, although he intends no Favour, but Indifferency, and for his Knowledge which he has in the Matter; yet for this the whole Array shall be quashed. And the Array was challenged, for that it was made by the Under-Sheriff of *Middlesex*, at the Nomination of the Plaintiff, and so favourable. But *Brian* and his Companions, contrary to their former Opinion, said to the Triers, that if the Sheriff put any into the Panel at the Nomination of either Party, with favourable Intent, that he shall rather pass for the one Party than the other, that then the whole Array shall be quashed. And by the Reporter this seems the better Opinion, and so it seems by the Form of the Challenge *supra*, for he does not alledge sufficient, by saying that he was put in at the Denomination of the Party only, but he concludes, and so favourable; and therefore if it was for Indifferency, and not for Favour, it is no Matter. 21 *E.* 4. 74. *Bro. Chall.* 184.

The Array was challenged, for that it was favourably made by the Sheriff at the Denomination of the Defendant, and it was given in Evidence that several of them were Cousins and allied to the Defendant. *Fineux*: This is no Cause to
quash

quash the Array; for it may be that the Sheriff did not know it; but if he put any into the Panel at the Denomination of the Party, this is good Cause, be they a Kin or not; and if he put them in, perceiving that they would be favourable to the Party, it is a good Cause; for the Intent of the Sheriff is solely, in this Case, to be considered. It was held to be a good Challenge, that the Array of the Tales was made at the Denomination of one of the petit Jury. 14 H. 7. 2. *Bro. Chall.* 71.

A Suit depending between the Officer who made the Panel, and one of the Parties.

It is no principal Challenge to the Array, that the Coroner who, made it, had an Action of Debt depending against the Defendant; but it would, if it had been an Action of Trespass for a Battery; for that implies Malice. And it had been a good Challenge, if the Defendant had had an Action of Debt depending against the Coroner. Upon such Challenge the Record ought to be shewn. 11 H. 4. 26. *Chall. Bro.* 45. *Fitzh.* 87. *Vide 1 Bull.* 5. 2 *Brown. Earl of Shrotesbury* against *The Earl of Rutland.*

R. brought an Assise against *A.* and against a Bailiff of a Franchise of the Isle of Wight. *A.* brought an Assise of Common of Pasture against *R.* and the same Bailiff, who was named in the other Assise, made the Array in this Assise, and the Array was challenged by *R.* for this Cause. And because that the Writ which was brought against the Bailiff and *A.* was not arrayed, the Justices held the Array made by the Bailiff suspicious, and quashed

quashed it, and awarded a *Non omittas*, and some said that the Justices ought to have inquired first by Triers, if the Bailiff had misbehaved in his Office for this Cause, or not. *Quaere.* 39 *Aff.* p. 2. *Chall.* Bro. 208. *Fitzb.* 130.

The Array was challenged, because it Array was made by a Bailiff of a Franchise, made by a who was Procurer for the Plaintiff, and it Procurer was found that all the Panel but five were for the good; yet the whole Array was quashed, Plaintiff. and Process issued to the Sheriff to make a new Panel so that the Bailiff should not intermeddle. 28 *Aff.* p. 22. *Chall.* Bro. 126. *Fitz.* 140.

It is a good Challenge that the Array Array was made by one who maintained the made by Suit for the Plaintiff. 15 *Aff.* p. 1. *Chall.* a Main- Bro. 103. *Fitzb.* 113. tainer.

If the Array be returned by a Bailiff Array of a Franchise, and the Sheriff returns made by this as of himself, it shall be quashed. the Bailiff 17 *Aff.* p. 11. *Chall.* Bro. 105. *Fitzb.* of a Fran- 13. chise, and returned by the Sheriff.

The Array was quashed, for that it was Bailiff re- made by the Bailiff of the Abbot of *West* turns Men *minster*, who had returned men of the out of his Guildable out of his Jurisdiction. 32 *Aff.* Franchise. p. 6. *Chall.* Bro. 138. *Fitzb.* 110.

The Array was challenged, for that it Array was made by one who was not Bailiff of the made by Franchise of *D.* to whom the Sheriff had one who sent his Precept to serve the Writ, nor had had no be any Warrant to return the *octo Tales*; Authority. and

and therefore it was quashed. 38 *Aff. p.* 13. *Bro. Chall.* 207.

Array
challeng-
ed for Fa-
vour, for
that they
had al-
ready
found the
same Issue
against an-
other De-
fendant.

Trespas against *A.* and *B.* *A.* pleads that the Land was his Freehold, and there- upon Issue is joined. *B.* pleads that the Land is the Freehold of *A.* and that he entered by his Command, and upon that Issue also is joined; the first Issue was found for the Plaintiff; and when the Jury appeared upon the last Issue, *B.* challenged the Array, because they had already found against *A.* upon the same Issue; and therefore it was to be presumed they would say as they had before; but it would have been otherwise, if *B.* had pleaded Not guilty, for that stands indifferent; afterwards it was agreed not to be a principal Challenge; wherefore he concluded to the Favour. 18 *E. 4.* 12. *Bro. Chall.* 175.

Array
made of
People in-
terested in
the Land.

The Defendant claimed for Term of Life, by a Lease from the Mayor and Commonalty of *D.* who had the Reversion; and the Array was challenged, for that it was made of the People of that Corporation, which being found true on Examination, the Array was quashed. 28 *Aff. p.* 18, 23. *Chall. Bro.* 125, 127. *Fitzb.* 139, 140.

Peer chal-
lenges the
Array, be-
cause no
Knight re-
turned.

In an Assise brought against the Earl of *Derby* and *Aunsel*, the Earl challenged the Array, because no Knight was returned of the Panel, and the Challenge was allowed. *Mich. 1 & 2 Ph. & M. Newdigate* versus *Comit' of Derby*, *Plowd.* 117. *Fitzb. Chall.* 115. *Enquest* 43. *Bro.* 100. *Jurors* 48. *Panel* 14. *Trials* 142.

In

In Replevin against the Bishop of S. and others, he challenged the array, because no Knight was returned of the Panel. *Curia*: As there is but one Panel, this Challenge shall serve for the other Defendants. *Dyer* 246. b.

The Panel was challenged, for that there were no Hundredors; it was said that there were not any sufficient in the Hundred, who were not of the Plaintiff's Fee; to which it was answered, that then it ought to have been so returned; and it was found that there were none in the Franchise who were not of the Plaintiff's Fee, and that the People impanelled were of the next Hundred, and of the most sufficient; whereupon the Array was held to be good. 45 *Aff. p. 1. Chall. Bro.* 148. *Fitz.* 123.

Where the Array was quashed, for that Process it was made by *J. B.* who was aiding shall not and of Counsel with the Plaintiff, the go to the Sheriff was ordered to make the Array Coroners, by another Officer: and so it seems, Pro- but when cess shall not issue to the Coroners, but there is a when there is Default in the Sheriff him- Default in self. Afterwards the Sheriff returned an- the Sheriff. other Panel, but Part of the People who were in the first Panel, were in the last Panel, and the Sheriff returned that there were not more sufficient in the Hundred. And the Array was challenged again for Suspicion, for that Part of the former Panel were in this Panel; but the Challenge was not allowed. 33 *Aff. p. 12. Bro. Chall.* 139.

The

The Defendant's Bailiff for the Defendant's Liberty returned the Panel, and it was challenged; *Wilby* awarded that a *Non omittas* should not issue, for the Bailiff did as he ought, when the Precept came to him from the Sheriff; but a Writ should issue to the Sheriff, *sicut alias ita quod balivus libertatis non se intromittat.* 26 *Aff. p.* 22. *Bro. Chall.* 117.

The Array was quashed, because the Sheriff was Tenant to the Defendant when the Array was made; now the Process shall go to the Coroner, unless the Plaintiff alledge that the Sheriff had aliened the Land: Afterwards *et sic de consimilibus*, that are Matters in Fact. But the Court said, that if the Array be quashed, for that it was made favourably by the Sheriff, the Process shall never go back to this Sheriff; for it shall not be intended but that the Favour continues. 15 *H. 7. 9.* *Bro. Chall.* 78.

If the Array returned by Sheriff be quashed for Partiality in the Sheriff, Process shall never go to the Sheriff again, tho' a new Sheriff be afterwards made for the Entry *quod vicecomes non intromittat.* 18 *E. 4. 3.* *Bro. Chall.* 173.

Where the Plaintiff says that the Sheriff is Cousin to the Defendant, and it being confessed, prays Process to the Coroners, he shall have it; but afterwards Process shall not be awarded to the Sheriff in that Action, although a new Sheriff be chosen. 14 *H. 7. 31.* *Chall. Bro.* 76.

Panel made by the Bailiff of a Liberty quashed for Affinity between him and the Plaintiff, Process, with a *Non omittas*, was awarded to the Sheriff. 22 E. 4. 2. Bro. Chall. 186.

If the Array is quashed for Default of the Coroners, Process shall never go to those Coroners, nor to others, but Esliors shall be chosen, and the *Venire facias* issue to them. 18 E. 4. 3. Bro. Chall. 173.

If Favour be found in the Under-Sheriff, the Process shall issue to the Sheriff himself; but not *é contra*. 18 E. 4. 3. Chall. Bro. 175.

If Process issues to the Coroners upon a Challenge for a Default in the Sheriff, and afterwards the Parol is without Day, by the Demise of the King, a Re attachment shall issue to the Coroners against the Jury, and not to the Sheriff. 10 E. 4. & 49 H. 6. 13. Chall. Bro. 169.

The Array of the principal Panel being quashed, for that the Sheriff was Son-in-Law to the Defendant; but the Array of the *Tales* being made by a new Sheriff, the *Venire facias de novo* was awarded to the new Sheriff, for no Default was in him; but if the Array of the principal Panel had been quashed in the Time of the old Sheriff, and the *Venire facias* had been awarded to the Coroners, then it should at all Times be sent to the Coroners, and never resorted back to the new Sheriff. 9 E. 4. 46. Chall. Bro. 85. Fitz. 57.

The

The Impartiality of

The Array made by the Predecessor of the present Sheriff being challenged and quashed for Consanguinity, the Plaintiff may either pray Process to the present Sheriff, or to the Coroners. *Mich. 2 & 3 Eliz. Dyer 188. b.*

The Sheriff being challenged, Process was awarded to the Coroners, who returned the *Venire facias*; but a full Jury not appearing, a *Tales* was prayed by the Plaintiff, and returned by the new Sheriff, Verdict for the Plaintiff, but held to be a Mis-trial. *Mich. 44 & 45 Eliz. Corne versus Pastow, Tel. 15. Cro. Eliz. 894. Hob. 64. T. 36. Eliz. Wie versus Morgan, Tel. 15. Mis-trials aided by Stat. 21 Jac. 1. c. 13.*

Indifferency and Impartiality required in the Jurors themselves.

Action by a Corporation, and Juror one of the Body. **B**Rian C. J. in an Action brought by a Mayor and Commonalty, or by a Dean and Chapter, it is a good Challenge that the Juror is one of the Commonalty, or of the Chapter. *21 E. 4. 11. Chall. Bro. 180. Fitzb. 60.*

Juror married Sister of either Party. It is a good Challenge to a Juror, that he has married the Sister of either Party, if she be alive, or has left issue. *21 E. 3. 41. Bro. Chall. 54.* It is a principal

Juror brother to Plaintiff's Wife. Challenge that the Juror is brother to the Wife of the Party; for he and his Wife are one Person in Law. *21 E. 4. 11. Chall. Bro. 180. Fitz. 60.* It is a good principal Challenge

Challenge that the Juror is Cousin to the JurorCou-
 Defendant's Wife, and thereby allied to the sin to the
 Defendant, for it is possible the Defen- Defen-
 dant's Issue may be Heir to the Juror; dant's
 but the Plaintiff did not shew how he Wife.
 was Cousin, which it seems clear he ought
 upon a principal Challenge. 8 H. 6. 15.

Chall. Bro. 58. Fitzh. 25. It is no prin- Juror mar-
 cipal Challenge that the Juror had married Mo-
 ried the Mother of the Defendant, if she ther or
 be dead, and he had no Issue by her; for Cousin of
 the Cause of Favour is determined. The the Party,
 same Law of him who marries my Cou- who is
 sin, who may be Heir to me, this is a dead with-
 principal Challenge; but not if the Wo out Issue.
 man die without Issue. 14 H. 7. 2. *Bro.*
Chall. 71.

It is a good Challenge to the Knights One of the
 who come to impanel the grand Assise, four
 that one of the four is married to the Knights,
 Daughter of the Plaintiff; and the other Son in-
 three shall try it. *M. 2 & 3 Phil. & Ma. Law to the*
Moor 3, 10. Dyer 103. b. Plaintiff.

In an Action brought by the Dean and Action by
 Chapter of *Lincoln*, it was held to be a Dean
 good principal Challenge to a Juror, that and Chap-
 he was Brother to one of the Prebendaries ter, Juror
 of the Chapter. 21 E. 4. 11. *Chall. Bro. Brother to*
180. Fitzh. 60. 15 E. 4. 18. 28 Ass. one of the
18. Hob. 87. And in the Times when Prebenda-
 Monasteries were in Being here, in an Ac- ries.
 tion brought by an Abbot, it was a good
 principal Challenge to a Juror, that he was
 Uncle, Brother or Cousin to one of the
 Abbot's Monks. *Bro. Chall. 14, 140, 167,*
180. Fitz. 54, 60.

Juror
Godfather
to the
Plaintiff's
Child, or
Plaintiff to
the Ju-
ror's.

It is a good principal Challenge to a Juror, that he is Godfather to the Plaintiff's Child; though it was formerly held otherwise, and was not always a principal Challenge. But on the contrary, if the Plaintiff was Godfather to the Juror's Child, it was always held to be a principal Challenge. 2 H. 4. 15. *Chall. Bro.* 31. *Fitzb.* 77. 19 H. 6. 66. *Chall. Bro.* 62. *Fitzb.* 34. T. 28 H. 8. *Moor* 3, 10. *Sed vide* 40 *Aff. p.* 20. *Chall. Bro.* 143. *Fitzb.* 131. *Contra*, if a Juror is challenged for being Godfather to the Plaintiff's Child, it shall not be inquired whether he be Godfather to a Son or a Daughter. 7 E. 4. 4. *Chall. Bro.* 167. *Fitz.* 54.

Juror Bro-
ther to
Plaintiff's
Testator.

In Debt by Executors, it is a good Challenge that the Juror is Brother to the Testator. 21 E. 4. 11. *Chall. Bro.* 180. *Fitzb.* 60.

Juror Cou-
sin to him
in Rever-
sion, when
Tenant
for Life is Plaintiff.

Hussey C. J. in an Action by Tenant for Life, it is a good Challenge that the Juror is Cousin to him in the Reversion. 21 E. 4. 11. *Chall. Bro.* 180. *Fitzb.* 60.

Juror Cou-
sin to the
Patron, in
an Action
touching the Rectory.

Fairfax: In an Action of a Thing touching a Rectory, it is a principal Challenge that the Juror is Cousin to the Patron. 21 E. 4. 63. *Chall. Bro.* 180.

Juror Cou-
sin to the
Prayee in
Aid.

Where Tenant for Life or the like prays in Aid, it is a good Challenge that the Juror is Cousin to the Prayee in Aid, and yet he is

is no Party to the Action, but he may have
 Lofs. 21 E. 4. 11. *Chall. Bro.* 180. *Fitzb.*
 60.

In Attaint, one of the grand Jurors was In Attaint,
 challenged, for that he was Son and Heir a grand
 to one of the petty Jury, who was dead, Juror Son
 and he was drawn; for it is to be pre- and Heir
 sumed that he will not falsify the Verdict to one of
 of his Father. But a Challenge for that the petit
 one of the grand Jury was Cousin to one Jury, who
 of the petit Jury, who was dead, was is dead.
 disallowed, because he who was dead, was
 not a Party. 34 *Aff. p.* 6. *Chall. Bro.* 140.
Fitzb. 127.

In Attaint, one of the grand Jurors was In Attaint,
 challenged, for that he had married the one of the
 Sister of the Wife of one of the petty grand Ju-
 Jury; but it was not allowed without say- ry and one
 ing that he was procured. *Quod mirum* of the pe-
pluribus, for it seems to be a principal tit Jury
 Challenge. 43 *Aff. p.* 25. *Chall. Bro.* 145. had mar-
Fitzb. 103. In Attaint, it is no principal ried two
 Challenge, that one of the petty Jury and Sisters.
 one of the grand Jury had married two
 Sisters, notwithstanding the Affinity; and
 therefore it was said that the Juror was
 procured; and the Affinity was found, but
 not the Procurement; wherefore he was
 sworn. 43 *Aff. p.* 46. *Chall. Bro.* 147.
Fitzb. 93.

In Attaint, one of the Jury was chal- Challenge
 lenged, for that he was of Affinity and for Affini-
 allied to the Plaintiff; but because he was ty disal-
 a Kin in a long Degree, and also of the lowed, be-
 Part of the Mother, so that the Land cause of a
 could not resort to him, for this was an long De-
 P 2 Attaint the Land
 in Question could never come to the Juror.

Attaint founded on an Affise of Land, the Challenge was disallowed. 40 *Aff. p.* 20. *Chall. Bro.* 143. *Fitzb.* 131.

Consanguinity in the ninth Degree. Cousinage in the ninth Degree is a good principal Challenge. 41 *E.* 3. 9. *Chall. Bro.* 20. *Fitzb.* 99. 21 *E.* 4. 11. *Bro. Chall.* 180.

Consanguinity no Challenge where Juror a Bastard, or Bastardy in the Descend. A Juror was challenged, for that he was of Kin to the Plaintiff's Wife, within the ninth Degree; but the Father of the Juror being a Bastard, the Challenge was not allowed. 41 *E.* 3. 9. *Chall. Bro.* 20. *Fitz.* 99. A Juror was challenged, for that he was Cousin to the Defendant; but it being found that he was a Bastard, he was sworn. *M.* 6 *R.* 2. *Fitzb. Chall.* 102.

Must be shewn in what Manner the Kindred is. In a principal Challenge for Consanguinity, the Party must always shew in what Manner the Parties are Cousins. 21 *E.* 4. 63. *Chall. Bro.* 180. *Fitz.* 60. Yet the Conveyance shall not be tried, but only whether Cousin or not. 7 *E.* 4. 4. *Chall. Bro.* 167. *Fitzb.* 54.

Juror's Son married Plaintiff's Daughter. It is not a principal Challenge, that the Son of a Juror had married the Daughter of the Plaintiff; because it is not between the Parties, as where the Juror himself has married the Daughter of the Plaintiff. 3 *E.* 4. 12. *Chall. Bro.* 161. *Fitzb.* 50.

Juror Jointenant with two, under whom the Defendant justified. In Trespass it is a good Challenge to the Favour, for that the Defendant had justified the Trespass, by the Command of two who were seised of the Land in Fee, jointly with the Juror; but it was no principal Challenge, because no Freehold to

to be recovered. 7 *H. 6.* 44. *Chall. Bro.*

57. *Fitz.* 24.

It is a principal Challenge, that the Juror Tenant to the Plaintiff. 34 *Aff. p.* 6. *Chall. Bro.* 140. *Fitzb.* 127. In Attaint, it is a good Challenge, that the Juror is the Plaintiff's Lessee for Years of Lands, which the Plaintiff lost by the first Verdict, and sues to recover by the Attaint; for the Juror is in a Manner a Party. 21 *E.* 3. 41. *Bro. Chall.* 54. That To the the Juror holds Lands of the Defendant, Defendant is a principal Challenge. 21 *H.* 7. 38. *Bro. Chall.* 91.

In Attaint it is a principal Challenge, that one of the grand Jury holds of one of the petit Jury, without alledging Favour; for he is within his Distress. 22 *E.* 4. 1. *Chall. Bro.* 185. *Fitzb.* 64. *Account.* The Plaintiff challenged a Juror, for that the Defendant had leased to him for Term of Life of *N.* who was dead; but before his Death the Juror had sown the Land with Corn, which was still growing. *Cotes:* It appears that he is not Tenant, nor within the Distress of the Defendant, for the Estate is determined; *quaere*, for he was spared, because many others appeared. 4 *H. 6.* 25.

That the Defendant holds Lands of the Defendant Juror is no principal Challenge. 21 *H.* 7. Tenant to 38. *Bro. Chall.* 91. But in Attaint, it is Juror. a principal Challenge, that one of the petty Jury holds of one of the grand Jury, because of the Judgment in Attaint, whereby the Lands shall be wasted and destroy-

ed. 22 E. 4. 1. *Chall. Bro.* 185. *Fitzh.* 64.

Juror Tenant of *J. N.* Tenant of the Plaintiff.

It is a good Challenge that the Juror holds of *J. N.* who holds of the Plaintiff; although the Juror be not the Plaintiff's immediate Tenant. 38 E. 3. 25. *Chall. Bro.* 52. *Fitzh.* 92.

The Juror is Lessee of the Plaintiff, but has granted over his Estate.

The Defendant challenged a Juror, for that the Plaintiff had leased to him the Ward of certain Land, during the Non-age of the Infant, rendering Rent, which Infant was still under Age; the Plaintiff said that long before the Action commenced, the Juror had granted his Estate over, but the Challenge was allowed; for *per Knivet*, he may yet distrain and make Avowry, or have an Action of Debt against the Juror, *Quod mirum* of this Judgment, *ideo quaere*; also it does not appear, if any Rent was in Arrear or not. 44 E. 3. 5. *Bro. Chall.* 21. *Fitzh. Chall.* 97.

Juror holds of a Manor, of which Manor the Plaintiff has the Reversion,

A Man leases a Manor for Life, it is a good Challenge in an Action between the Lessor and a Stranger, that the Juror holds of this Manor, whereof the Party has the Reversion. 10 H. 7. 20. *Bro. Chall.* 220.

Juror Tenant to one, under whom the Defendant justified in Trespass.

In Trespass, the Defendant said that the Land was the Freehold of *J. C.* and that the Defendant entered as his Servant, and by his Command; and it was held to be a good principal Challenge to a Juror, that he

he was Tenant to *J. C.* But the Law seems to be otherwise; because *J. C.* was no Party to the Record; yet he might conclude to the Favour. 10 *E. 4. 12. Chall. Bro. 168. Fitzb. 58.* It was held to be a good principal Challenge in Trespass, where the Defendant justified as Servant to Lord *Dacres*, and by his Command, that the Juror was Tenant to Lord *D.* and within his Distress; although the Lord *D.* was not Party to the Issue; and that it is a good principal Challenge, if he be within his Distress, though it be but for a Rent-charge. 15 *E. 4. 18. Bro. Chall. 68. Vide 9 H. 7. Bro. Chall. 158.*

In a Writ of Entry the Tenant vouched, Juror Tenant and the Voucher being traversed, one of the Jurors was challenged, for that he was Tenant to the Vouchee; *sed non allocatur*; where the for the Issue is between the Demandant and the Tenant, and the Vouchee is no Party; otherwise, if he had been Tenant to the Tenant. 7 *H. 4. 1. Chall. Bro. 34. Fitzb. 158.*

If a Juror is challenged for being Tenant to either Party, it shall not be tried by what Service or Tenure he holds, but whether he is Tenant to him or not. 7 *E. 4. 4. Chall. Bro. 167. Fitzb. 54.*

Nele J. In an Action brought by a Dean and Chapter, it is a good Challenge that the Juror is within the Distress of one of the Chapter. 21 *E. 4. 11. Chall. Bro. 180. Fitzb. 60.* It is a good Challenge to a Juror, that he has a Hundred, to which the Juror ought to come; for he is within the Plaintiff's Distress, though he

be not his Tenant. 38 E. 3. 25. *Chall. Bro. 52. Fitzb. 92.* A principal Challenge to a Juror, that he was within the Plaintiff's Distress, viz. the Plaintiff had a Hundred, within which the Juror was resident, and made Suit to the Leet of the Hundred once a Year; and no other Cause of Tenure. *Dyer 176.*

Plaintiff retained by Juror, and of his Fee.

It is a good principal Challenge to a Juror, that the Plaintiff was retained by him, and had of him 20s. a Year Fee. 2 H. 4. 13. *Chall Bro. 29. Fitzb. 75.*

Defendant Steward of the Juror's Manor.

A Juror challenged for being of the Party's Fee. 49 Aff. p. 1. *Chall. Bro. 150. Fitzb. 100.* That the Defendant is Steward of a Manor, whereof the Juror is seised, was not allowed as a principal Challenge, no more than to say that the Defendant is within the Distress of the Juror; but it is a good principal Challenge to say that the Juror is within the Distress of the Defendant, or that the Juror is Servant to the Plaintiff or Defendant. 14 H. 7. 2. *Bro. Chall. 71. Moor 3, 7.*

Juror the Avowant's Steward.

In Replevin, the Defendant avowed for Rent service, the Plaintiff pleaded *extra feodum*. It is a principal Challenge, that a Juror is the Avowant's Steward of his Manor, &c. T. 27 H. 8. *Moor 3, 7.* A Juror challenged for being of the Counsel of one of the Parties. 49 Aff. p. 1. *Chall. Bro. 150. Fitzb. 100.*

Juror Parrishioner.

It is no Challenge that the Juror is Parrishioner of the Party. 22 Aff. p. 25. *Bro. Chall. 112. Nele J.* In an Action brought

brought by a Person, it is a principal Challenge, that the Juror is of the Party's Parish and Cure. 21 E. 4. 63. *Chall. Bro.* 180.

It is a principal Challenge, that the Juror is Forester of the Forest of N. where the Plaintiff is Master of the Game. 16 E. 4. 1. *Bro. Chall.* 171.

It is a principal Challenge in Trespass, Juror and that the Juror was chosen Arbitrator for Arbitration the Defendant for the same Trespass, though it is otherwise, where four are chosen indifferently; but if the one Party chose two, and the other Party chose the other two, there they are challengeable. 3 H. 6. 24. *Bro. Chall.* 7. A Juror was challenged, for that he was chosen Arbitrator between the Parties; and being sworn on a *Voier dire*, owned it, and being asked if he had had Communication of the Matter, said he had; whereupon the Triers finding accordingly, and he was drawn. 9 E. 4. 46. *Chall. Bro.* 85. *Fitzh.* 57.

Conspiracy at the Suit of the Party: The Juror gave Defendant challenged a Juror, for that the Defendant had been indicted and attainted of the same Conspiracy, at the Suit of the King, and this Juror was of the Jury and attainted him; but the Challenge was disallowed, for the Juror did according to his Oath; and this is no Presumption of Ill-will. Yet this is a good Challenge, if he had concluded to the Favour. 27 Aff. p. 13. *Bro. Chall.* 120. It is no Challenge, that the Juror passed before against him in another Action. 29 Aff. p. 3. *Bro. Chall.* 132. *Fitz.* 145.

In a Plea of Land, it is a good Challenge, that the Juror before passed with the Tenant against a Stranger for this Land, where the present Demandant was no Party, for the Juror is favourable to the Title; and therefore it is a principal Challenge, and he was put on View of Record, and so it seems, that the Record ought to be shewn in such Case. 7 H. 4. 11. *Chall. Bro.* 197.

The Defendant by his Plea, claiming under a Gift in Tail, the Plaintiff challenged one of the Jurors, for that he had before been of the Jury, and found for the Defendant on the Gift in Tail, in an Action between the Defendant and a Stranger, for Parcel of the Land comprised; wherefore on shewing the Record, the Challenge was allowed, for the same Deed is now in Issue. 7 H. 4. 11. *Bro. Chall.* 38, 197.

It is a good Challenge against a Juror, that he has before given a Verdict in the same Action; but then the Record must be shewn. The Plaintiff challenged a Juror, for that he had passed against him before, in an Action for the same Matter, which was reversed on a Writ of Error, but because the Record was in another Court, and he did not shew the Record; the Challenge was disallowed, and the Juror sworn. 33 H. 6. 1. *Bro. Chall.* 15. *Fitzb.* 41.

In Maintenance, the Defendant challenged a Juror, for that he was of the Jury in the principal Action, in which it
is

is now supposed that the present Defendant maintained the Defendant in that Action, and found for the Plaintiff in that Action; but the Challenge was not allowed, for this is no Colour of Favour; it shall be intended that he found according to his Conscience, and Maintenance lies, although the Verdict be true; for it is not lawful to maintain a just Cause. 35 H. 6. 63. Bro. Chall. 19. Fitzh. Chall. 45.

It is no principal Challenge, that a Juror passed with the Plaintiff in an Issue upon the same Matter between the Parties; for a Man shall not be challenged for speaking the Truth. Wherefore they concluded to the Favour; for it is no principal Challenge. 9 E. 4. 16. Bro. Chall. 83. Fitzh. 55.

After the Array affirmed, a Juror was challenged, for that he had before passed against the Defendant in an Affise brought by the Plaintiff. Choke: This is no Challenge, without concluding to the Favour, unless he shew the Record exemplified, and then it is a principal Challenge, *quod non fuit negatum*. And this was an Action upon the Statute of 5 R. 2. of the same Land and Title. 21 E. 4. 74. Bro. Chall. 184.

A new Trial being ordered, the Justices said that the Plaintiff should take Heed that he hath none of the principal Panel which passed in the first Trial; for it is a principal Challenge, that he was in the first Trial. Trin. 26 Eliz. B. R. Long's Case, Cro. Eliz. 33.

Jurors

Juror giving his Opinion, or declaring before-hand in what Manner he will find.

Jurors challenged, for that they had declared the Right for the one Party, and not for the other, in giving their Verdict before hand. 49 *Aff. p. 1. Chall. Bro. 150. Fitzh. 100.*

When a Juror is challenged for Favour, though he has twenty Times declared that he will find for the one Party or the other Party, on Account of the Knowledge that he has of the Truth of the Matter in Dispute, he is to be deemed indifferent; but otherwise it is, if he has said so on Account of Affection for one Party more than the other. 7. *H. 6. 25. Bro. Chall. 55.*

It is a good Challenge, that the Juror hath reported, that if he be impanelled he will find for the Plaintiff. 21 *H. 7. 29. Bro. Chall. 90.*

A Juror was challenged, for that he had said to one of the Parties, *Provide to pay, for if I am sworn I shall give my Verdict against you;* and the Party himself was allowed to prove this, and the Juror was drawn. *Pasch. 8 Jac. 1. Odil against Tyrrel, 1 Bulst. 20.*

Appeal of Murder: The Defendant challenged a Juror, for that when the grand Jury found this Fact but Manslaughter, the Juror said, that if he had served of the Jury, he would not have found it in any other Manner than as the Coroner's Inquest before had found it; (*Nota*, the Party himself did not hear him say this, but a Friend of his) upon this the Triers found him not indifferent. *Pasc. 9 Jac. 1. Vicaridge against Gelse, 1 Bulst. 121.*

On

On an Indictment, it is a good Challenge to a Juror, that he was one of the grand Jury that found the Bill. 19 *Ass.* p. 6. *Bro. Chall.* 107.

That the Juror was of the grand Jury or the Indictor.

Upon Traverse of an Indictment for Felony or any other Matter, the Indictor may be challenged. 44 *E.* 3. 43. *Bro. Chall.* 23.

In a Writ of Conspiracy, the Plaintiff challenged one of the Jurors, for that he was one of his Indictors of the same Indictment on which he was acquitted, and for which he brought his Action; and this being found, the Juror was drawn; though the Point now to be tried, was the Conspiracy, and not the Felony. 7 *H.* 4. 2. *Chall. Bro.* 42. *Fitzh.* 79.

In Trials of Felony, it is a good principal Challenge, that he was one of his Indictors; but it is otherwise in a Trial on an Indictment for a Trespass. Yet the Statute 25 *E.* 3. c. 3. speaks as well of Trespass as of Felony. 7 *E.* 4. 4. *Chall. Bro.* 166. *Fitz.* 53.

It is no principal Challenge, that a Juror is indebted to the Plaintiff or Defendant. *M.* 26 *H.* 8. *Moor* 3, 6.

Juror indebted to Plaintiff or Defendant

A Juror was challenged, for that he had bought Lands of one of the Parties in the Suit, *scil.* of the Lessor, and that the Lessor did owe to this Juror 10*l.* notwithstanding this Challenge, the Triers found him to be indifferent; but the Court said it would have been otherwise, if the Juror had owed Money to one of the Parties. *Pasch.* 8 *Jac.* 1. *Odil ver. Tyrrel*, 1 *Bulst.* 20.

One of the Parties indebted to the Juror.

In Attaint, it is a good Challenge for the

the

Variance
between
the Defen-
dant and
Juror.

the Defendant to a Juror, that he and one of the petit Jury were at Debate; and of this not only the petit Juror but the Defendant may take Advantage. 30 *Ass. p.* 34. *Bro. Chall.* 135.

Where a
Suit be-
tween a
Juror and
one of the
Parties,
shall be a
good Chal-
lenge.

The Defendant the Bishop of *E.* challenged certain of the Jurors, for that he had sued them in the Court of *Rome*; this Challenge was disallowed, for it was his own Suit; though it had been a good Challenge that the Jurors sued the Bishop in the Court of *Rome*. But they inquired if the Juror had done any Trespas, whereby the Bishop had just Cause to sue him in the Court of *Rome*; and so it seems to be no principal Challenge, but a good one to the Favour or Malice. 38 *E. 3.* 25. *Bro. Chall.* 52.

Attaint; the Plaintiff challenged a Juror, for that he had brought an Action of Maintenance against that Juror, for Maintenance in principal Matter: The Defendant said that this Action was brought against this Juror and twenty-nine others, of the most able in the County, to the Intent to challenge them; and this was tried immediately without any Record, and it was found *per cautele ut supra*, and the Jury was sworn. 43 *Ass. p.* 46. *Chall. Bro.* 147.

Affise: A Juror was challenged, for that the Defendant had an Action of Trespas against him, returnable before the Affise; and therefore he was favourable. It was alledged that the Writ was purchased by Covin, to the Intent the Juror should not be sworn, and it was prayed that the Covin might be tried, which was done accordingly, and it was found that

it

it was by Covin, and that the Juror was indifferent; wherefore *Priset* set him aside, and proceeded to swear in other Jurors; for it was doubted whether it was by Covin or not, for the Writ of Trespass was returnable before the Assise; and therefore they could not then know the Names of the Jurors. *Littleton*: If the Tenant and Vouchee are at Issue and Challenge by Covin, the Demandant, who is a Stranger to the Issue, may for his Interest pray that the Covin may be tried; and it shall be tried, *quod Moile dubitavit.* 38 H. 6. 6. *Chall. Bro. 92. Fitzb. 49.*

It is a good Challenge to a Juror, that he For what has been attainted in a Writ of Conspiracy, Crimes in or in an Attaint, for they are antient Ac- a Juror he tions, but Attainder for Forgery of Deeds may be is no Challenge, for that is given since by challenged the Statute 33 H. 6. 1. 35. *Bro. Chall. 15.*

Debt: It is a good Challenge, that the Outlawry Juror is an Outlaw; for the Writ of *Venire* in a Juror. *facias* is *twelve free and lawful Men*; there Villenage is a good Challenge, as it seems. 21 H. 6. 30. *Chall. Bro. 64.*

It is a good Challenge to a Juror, that Juror Vil- he is a Villein; and the Bailiff was a- lein. merced for returning a Villein of the Panel; and a *Non omittas* was awarded. 26 *Aff. p. 28. Bro. Chall. 118.*

It is a good Challenge, that the Juror is a Villein. 9 H. 4. 16. *Bro. Chall. 83.*

It is a good Challenge to a Juror, that he Juror an is an Alien born, tho' he has been in Eng- Alien. land from his Infancy, and sworn in Leets, &c. for that will not make him a Denizen. 14 H. 4. 19. *Chall. Fitzb. 91. Bro. 48.*

Aliens

Aliens cannot be returned of Juries for the Trial of Issues between the King and the Subject, or between Subject and Subject. *Calvin's Case*, 7 Co. 18. b. They have no Freehold. 10 Co. 104. a.

Juror procured by Plaintiff.

Assise by an Infant: A Juror was challenged, for that he was procured by the Plaintiff; *sed non allocatur*, for the Plaintiff was an Infant. *Et sic vide* that an Infant cannot procure. 27 Aff. p. 45. Bro. Chall. 122.

Juror a Commissioner to examine Witnesses.

It is no principal Challenge to say, that one returned of the Jury was chosen Commissioner by the other Party for the Examination of Witnesses in the Court of Chancery, for every Commissioner is made and constituted by the King, by Commission under the Great Seal; and therefore he being a Commissioner of Record, is presumed in Law to be indifferent. But it is otherwise of an Arbitrator, for he is created solely by the Submission of the Parties themselves in *Pais*; and therefore it is a principal Challenge to say, that such a one returned of the Jury was Arbitrator for the other Party. *Trin. 9 Jac. 1. Peacock's Case*, 9 Co. 71. a. 7 H. 7. 10. 9 E. 4. 46. 15 E. 4. 24. 3 H. 6. 24.

Juror appeared as a Witness.

Appeal of Murder: The Appellant challenged a Juror for Favour, because he came in as a Witness in the Appeal, and came in by Process to be a Witness for the Appellant; the Juror confessing this on Oath, and the Triers finding him not indifferent, he was drawn. *Pasch. 9 Jac. 1. Vicaridge against Gelfe*, 1 Bulst. 121.

Freehold.

Not sufficient to Freehold is a good Challenge, and the Juror shall be examined

mined on Oath, if he had sufficient or not.
21 *H. 7. 29. Bro. Chall. 90.*

Of Challenges in General.

A Bailey in Assise may have all Chal- Who may
lenges to the Array and the Polls, as challenge.
his Master may. 9 *H. 7. 24. Bro. Chall.*
159.

In a principal Challenge for Consanguinity, it must be shewed how they are a Kin. 21 *E. 4. 63. Bro. Chall. 180.* If where the Array made by the Sheriff is quashed, the Party suggests that some of the Coroners are his Cousins, and therefore prays Process to the Residue, he must shew in what Manner they are of Kin; and if this be denied, so that Process issues to all the Coroners, though the other Party cannot challenge the Array for this Matter, yet it is said he may for Kindred in another Manner. *Sed quaere.* 4 *H. 7. 2. Chall. Bro. 154.*

And if the Defendant challenges the Array, for that the Sheriff, or other Officer who made it is of Kin to the Plaintiff, tho' he must shew in what Manner they are a Kin; yet if the Kindred be found in a different Manner, it is sufficient; for Kindred is the Substance, and the Manner but Form. As where the Defendant challenged the Array, for that it was made by *J. N.* the Under-Sheriff, who was Son of *J.* Son of *W.* Brother of the Plaintiff, it was found that he was Son of *J.* Daughter of *W.* Brother of the Plaintiff, and the Array was quashed. 19 *H. 8. 7. Chall. Bro. 1.*

The

The Conveyance shall not be tried, but only whether the Parties are Cousins or not.
7 E. 4. 4. Chall. Bro. 167. Fitzb. 54.

Confanguinity in a Kin to either Party is no Challenge to several of the Array. *14 H. 7. 1. Bro. Chall. 71.*
 the Jurors,
 no Challenge to the Array.

Challenge for Alliance disallowed, because in a long Degree, and the Land in Question could never descend to the Juror. A Challenge to a Juror for Affinity and Alliance to the Plaintiff, was not allowed, for that it was in a long Degree, and on the Part of the Mother, so that the Lands in Question could not resort to him. *40 Aff. p. 20. Chall. Bro. 143. Fitzb. 131.*

In a Challenge to the Array, for that the Sheriff is within the Plaintiff's Distress, the Defendant may shew several Particulars. The Defendant challenged the Array, for that it was favourably made by the Sheriff, who was within the Distress of one of the Plaintiffs, shewing that the Sheriff held Lands of a Manor now in Question, whereof one of the Plaintiffs had Possession, and also held Lands of him for Term of Years; the Plaintiff insisted that he ought to take one Cause only; but the Court held that he might alledge both, for the Challenge is, that he is within the Distress, and the Allegations are but Evidence to prove it. *Trin. 30 Eliz. Blunt versus Delabere, Goldsb. 91.*

Principal Panel challenged for Kindred in the Sheriff, whether the Array of the Tales made by a new Sheriff shall stand. In Attaint, the Jury was returned summoned, and a *Tales* being awarded, was returned by a new Sheriff, and now the first Panel

Panel being challenged and quashed, for that the old Sheriff who made that Panel was Cousin to one of the petit Jury, the Array of the *Tales* was quashed also at the Peril of the Plaintiff; but there were several Precedents that such a *Tales* should stand. *Mich. 6 E. 6. Littleton ver. Huckleton, Dyer 78 a. 91. b.*

The Sheriff returns the *Venire facias*, as executed by his Predecessor, when in Fact it was executed by himself, the Party may challenge the Array for Consinage or Affinity in the Sheriff, and it shall be tried by two Triers, notwithstanding the false Return. *Hil. 2 Eliz. Dyer 177. b.*

If the Plaintiff prays a *Venire facias* to the Sheriff, he cannot challenge the Array for principal Challenge, for any Cause in the Sheriff, whereof he could have Knowledge at the Time of awarding the *Venire*, as for Consanguinity, Affinity or the like, between him and the Sheriff; for upon such Cause shewn, he might have had Process to the Coroners; but of Consanguinity, Affinity, or the like, between the Sheriff and the Defendant, he shall not be presumed to have Knowledge at the Time of the awarding the *Venire*; and therefore where the Plaintiff prayed a *decem Tales* to the Sheriff, and it was awarded, and afterwards he challenged the Array, for that the Brother of the Wife of the Defendant had married the Daughter of the Sheriff, which the Defendant confessing, the Array was quashed. *Constable and Butler*, Serjeants, said, that this was clearly no principal Challenge; but

but the Court said, that the Plaintiff ought to have alledged that the Brother of the Defendant's Wife and the Sheriff's Daughter were alive at the Time of making the Array. 15 H. 7. 9. *Chall. Bro.* 77. *Furb.* 173.

The Sheriff and Coroners being challenged, and two chosen by Consent, to make the Panel. The Parties may challenge the Polls, but not the Array.

In Trespass between the Archbishop of *Canterbury* and the Abbot of *Battail*, the Archbishop shewed that the Sheriff was his Steward, and that some of the four Coroners was of his Robes, and others his Tenants, and within his Distress, and that this was known to the Defendant; whereupon by Consent the Parties chose two Knights to make the Panel, and a *Vener facias* was awarded, reciting the whole Matter, and after further Process to be awarded to them, as if it had been awarded to the Sheriff. In this Case the Parties shall not challenge the Array, but may challenge the Polls. 15 E. 4. 24. *Bro. Chall.* 69.

If Process be awarded to the Coroners for Default in the Sheriff, if Falsity be returned in the Coroners, the Justices shall chuse Esliors, who shall make the Panel, and execute all the Process, and the Parties shall not challenge the Array, but they may challenge the Polls, and so no Mistchief. 18 E. 4. 8. *Chall. Bro.* 174.

Challenge to the Array, for Matter since.

Though a Juror may be challenged for a Cause happened since he was sworn, yet the Panel cannot be so; for no ill Affection of the Sheriff arising since the Jury sworn, can make the Jury suspected, that was impanelled before. *Hil.* 15 *Jac.* 1. *Vicars and Langham, Hob.* 235.

After

After a Challenge to the Array tried, the Party shall not challenge the Array again for any other Cause, for then it would be infinite. 4 H. 7. 8. *Chall. Bro.*

155.

The Party cannot challenge the Array of the *Tales*, when he has challenged the Polls of the principal Panel before. 34 *Aff. p. 6. Bro. Chall. 140.* Cannot challenge the Array of the *Tales*, after having challenged the Polls of the principal Panel.

The Array of the *Tales* shall not be challenged till the Array of the principal Panel is tried. 9 E. 4. 46. *Chall. Bro. 85. Fitzh. 85.*

Where a Man challenges the Array, he need not verify his Plea; *S. Et hoc paratus est criticare.* 27 H. 8. 12. *Bro. Chall. 3.*

In Attaint, the Defendant challenged the Array of the *decem Tales*, because it was made in Favour of the Plaintiff, and the Plaintiff challenged the Array also, without shewing Cause of Challenge; and thereupon the Array was quashed, *quod Mirum*, &c. 8 H. 4. 22. *Chall. Bro. 43. Fitz. 80.* Array challenged by both Parties quashed.

The Defendant challenged a Juror, for that he had not sufficient Freehold, and also, for that he was favourable to the Plaintiff, and had promised to find for him; the Plaintiff also challenged him for the Hundred. *Court*: When both challenge him he shall be withdrawn without being tried. *Note*, That a Man shall have two or three Challenges together, and yet good, for the Challenge shall not be said to be double; and this is commonly used to take in all Causes at once. 20 *Aff. p. 13. Bro. Chall. 110. 3 H. 6. 38. Chall. Bro. 8.* If both Parties challenge a Juror, he shall be withdrawn without being tried.

The

but the Court said, that the Plaintiff ought to have alledged that the Brother of the Defendant's Wife and the Sheriff's Daughter were alive at the Time of making the Array. 15 H. 7. 9. *Chall. Bro.* 77. *Fitzh.* 173.

The Sheriff and Coroners being challenged, and two chosen by Consent, to make the Panel. The Parties may challenge the Polls, but not the Array.

In Trespass between the Archbishop of *Canterbury* and the Abbot of *Battail*, the Archbishop shewed that the Sheriff was his Steward, and that some of the four Coroners was of his Robes, and others his Tenants, and within his Distress, and that this was known to the Defendant; whereupon by Consent the Parties chose two Knights to make the Panel, and a *Vener facias* was awarded, reciting the whole Matter, and after further Process to be awarded to them, as if it had been awarded to the Sheriff. In this Case the Parties shall not challenge the Array, but may challenge the Polls. 15 E. 4. 24. *Bro. Chall.* 69.

If Process be awarded to the Coroners for Default in the Sheriff, if Falsity be returned in the Coroners, the Justices shall chuse Esliers, who shall make the Panel, and execute all the Process, and the Parties shall not challenge the Array, but they may challenge the Polls, and so no Mischief. 18 E. 4. 8. *Chall. Bro.* 174.

Challenge to the Array, for Matter since.

Though a Juror may be challenged for a Cause happened since he was sworn, yet the Panel cannot be so; for no ill Affection of the Sheriff arising since the Jury sworn, can make the Jury suspected, that was impanelled before. *Hil.* 15 *Jac.* 1. *Vicars* and *Langham*, *Hob.* 235.

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The

The Plaintiff challenged a Juror, immediately the Defendant challenged him, and before the Court had said Let him be drawn, the Plaintiff would have released his Challenge, but could not. *Dyer* 191.

If both Parties challenge the same Juror, and the Court say, Let him be drawn, they cannot, after this, release their Challenge. *Pasch. 9 Jac. 1. Vicaridge* against *Gelfe*, 1 *Bulst.* 121.

One Plaintiff challenges.

One Demandant may challenge, altho' the other agrees to the Juror. 10 *H. 6. 15. Chall. Bro.* 191. *Fitzh.* 31.

One Plaintiff agrees to a Challenge, the other not.

Formedon by two, the Tenant challenges a Juror, to which one Demandant agrees, and the other not; it was held that he should not be drawn, and the Co-*vin* should be tried, for that it concerns an Inheritance. 10 *H. 6. 15. Chall. Bro.* 191. *Fitzh.* 31.

In an Appeal by two, the Defendant challenges a Juror, and one Plaintiff agrees to it, he shall be drawn immediately, *quia in favorem vite.* 10 *H. 6. 15. Chall. Bro.* 191. *Fitzh.* 31.

If a Juror be found favourable against any of the Plaintiffs, he shall be drawn against all, for their Title is joint; otherwise of a Defendant, for he may be favourable to one and not to the other. 9 *E. 4. 27. Bro. Chall.* 84.

One Defendant challenges, the other not.

In an Affise against two, who pleaded severally, one challenged a Juror; the Challenge was tried, and he was put out; the other Defendant said he did not challenge him, and prayed that he might be sworn; but the Court refused it, for then they

they should take diverse Assises upon one Original. *Steuffe*: If he who challenges and the Plaintiff, are of one Assent to oust the other of his Challenges; Q. what Remedy, and if it be a Conspiracy. 30 *Aff. p.* 41. *Bro. Chall.* 134.

Where two Defendants plead to Issue in Trespass, or the like, and a joint *Venire facias* is awarded, and on the Challenge of one Defendant, the Array is quashed, the Inquest shall not be taken against the other. 50 *E. 3.* 1. *Bro. Chall.* 26.

There were two Defendants, one challenges and the other would not; yet it shall be tried, and if the Challenge be found, the Juror shall be drawn. The same Law of an Indictment of Felony. *Mich.* 4 & 5 *Pb. & Mar.* *Moor* 13, 48. 9 *E. 4.* 27. *Com.* 100. 33 *H. 8.* 20. 4 *H. 4.*

T. and *G.* being indicted for a Robbery severally, pleaded Not guilty; whereupon one *Venire facias* was awarded, and one Panel returned against both. Three of the Jury were sworn against both, then *T.* challenged the four next, without shewing Cause or saying peremptorily; *G.* would not challenge them, whereupon *T.* was put from the Bar, and these four Jurors, and as many more as made twelve were sworn against *G.* and found him Guilty. Held to be a good Trial; for he was not discharged, but stood aside; and held 1 *H. 3.* 10. *b.* that though it be one Panel, it is several Inquests in Law, and may proceed against one only; *contra* in Appeal.

Appeal. *M. 4 & 5 Pb. & M. Dyer*
152. *b.*

In an Action against three, if the Inquest be awarded by Default against two of them, they have lost their Challenges; and yet if the third Challenge a Juror who is drawn, he shall be drawn against all. *9 E. 4. 27. Bro. Chall. 84.*

When Ju-
ror chal-
lenged af-
ter sworn.

Juror cannot be challenged after he is sworn, except it be for Matter that happened since. *2 Brownl. 275.*

Challenge
after Juror
is sworn, for
Matter
since.

A Defendant may challenge a Juror that is sworn, for Matter since. *21 H. 7. 38. Bro. Chall. 91.*

If a Juror is challenged for Favour, and tried and found indifferent, he cannot be challenged after, and before he is sworn for the Hundred. *9 E. 4. 16. Bro. Chall. 83.*

If the one Party challenge a Juror, and the other don't, and after he who challenged released his Challenge, the other may well challenge him. *9 E. 4. 16. Bro. Chall. 83.*

Time for
Defendant
to chal-
lenge.

If the Demandant challenges a Juror, and when the Inquest is perused, and they come to him, the Demandant releases his Challenge, the Tenant may challenge him, though he did not challenge him, and he has not lost his Time. *37 H. 6. 8. Bro. Chall. 86.*

The Defendant challenged a Juror, who was tried, and afterwards the Plaintiff challenged all above, to which the Defendant would not agree; but prayed that he
I might

might name them, for it might be that he should challenge them also. *Vavafor*: It is reasonable; for if the one challenges all above, and the other does not demand their Names, and challenge them also, then he cannot challenge afterwards; and yet when the Cause of Challenge shall be tried, he may release his Challenge against whom he pleases, and the other Party shall not challenge afterwards, because he did not Challenge him at first; and after the Plaintiff released his Challenge. 14 H. 7. 5. *Chall. Bro. 72.*

Fitzherbert: If in perusing the Panel Cannot the Plaintiff challenges a Juror, and after, challenge when it is perused, so as the Clerk begins a Juror again to make the Party shew Cause after Panel his Challenge, the Defendant challenges is gone the same Person, and the Plaintiff will re-thro'. lease his Challenge, the Release shall be accepted, and the Juror shall be sworn, and the Defendant's Challenge shall be rejected; for if he do not challenge him in the first Perusal, he shall not be suffered to challenge him afterwards. *Quod nemo dedixit: quod nota, tamen contrarium,* 37 H. 6. 8. 27 H. 8. 2. *Bro. Chall. 2.*

If a Juror be challenged for Matter of Challenge Record, as for an Action depending be- for Matter tween the Party and the Juror, or such of Record. like, the Party shall shew the Record immediately, unless it be in the same Court; and then they will send for the Record. 43 Aff. p. 46. *Bro. Chall. 147.*

Where the Wife must join in a Challenge, tho' the Cause proceeds from the Husband only. In Trespass brought by Baron and Feme the Husband surmised that he was Servant to one of the Sheriffs; and therefore prayed Process to the Coroners: held that the Wife should join in the Challenge, though the Cause proceeded from the Husband. *Hill. 12 Jac. 1. Wright & Ux' versus Mouncton, 1 Brownl. 234.*

After a Juror has been tried and found indifferent, he cannot be tried again, tho' he afterwards expressed Words of Malice. A Juror was challenged for Malice to the Plaintiff, and being tried was found indifferent, and when he came to the Bar to be sworn, he said, *that although the Plaintiff had been a false Harlot to him, yet he would do according to Truth to the Plaintiff*; upon which it was prayed that he might be withdrawn, for his Malice appeared by these Words. *Fitzherbert*: He has been once tried and found indifferent, and therefore he cannot be tried again; whereupon he was sworn. *27 H. 8. 21. Bro. Chall. 4.*

A Juror was challenged and withdrawn; upon a *Tales* awarded and Process against the other Jurors, he appeared amongst them and was sworn and tried the Issue; for which the Judgment was reversed. *Trin. 32 Eliz. B. R. Hungate versus Hammond, Cro. Eliz. 188. Moor versus Vaughan, Cro. Eliz. 430.*

Defendant making Default, loses his Challenge. It was said by four of the Clerks, *S. Prothonotaries, ut videtur*, that he against whom the Assise is awarded by Default shall not challenge. And it was agreed that if the Plaintiff challenge any Juror

after the Affise is awarded by Default a-
 against the Defendant, that the Juror shall
 be drawn immediately. 10 E. 3. 32. 25
Aff. 31. Bro. Chall. 114. Fitzb. Inquest
 47. 28 *Aff. p. 42. Bro. Chall. 129.*
 4 E. 4. 1. *Bro. Chall. 162. Vide 22 Aff.*
 26. *Bro. Chall. 113.*

If a Man challenges the Array, and it is
 affirmed, and afterwards he challenges
 the Polls, he shall shew the Cause of his
 Challenge each Time immediately, and it
 shall be tried before the Clerk has gone
 through the whole, but the other Party
 may challenge and not shew Cause, nor
 his Challenge be tryed till the Panel is
 gone thro'. 19 *Aff. p. 6. 43 Aff. p. 46.*
Bro. Chall. 107, 147. 7 H. 4. 41, 46.
Chall. Bro. 39. Fitzb. 88. Moor 846.

In Trespass against three, one challeng-
 ed the principal Array, and it was tried
 and found against him, and then he and
 another challenged divers of the Polls,
 where he who had challenged the Array
 before, shewed his Causes immediately,
 but the other went through the Panel
 without shewing Cause, because he had
 not challenged the Array; and afterwards
 the third Defendant challenged the Array
 of the *Tales*; and the first Triers who
 tried the Array and the Polls tried the
Tales, and not new Triers. If a Juror
 be found favourable on the Challenge of
 one Defendant, he shall be withdrawn,
 notwithstanding another of the Defendants
 would have him sworn. 33 H. 6. 21. *Bro.*
Chall. 16.

Q 2

If

The Impartiality of

If in Attaint some of the petit Jury challenge the Array, and it is found against them, and afterwards others of the Petit Jury challenge the Polls, they must shew Cause presently. *Dyer 201. b. Vide P. 33 H. 6. 21.*

The Jury remained for Challenges, and six were sworn, and therefore a *Tales* was awarded returnable, &c. and at the Day the Defendant challenged one of them that was challenged before. *Brian* and *Vavasor*, then you must shew Cause presently, and for Matter since. 14 *H. 7. 6. Chall. Bro. 73.*

If after the Defendant has challenged the Array, and two Triers are chosen and sworn, and the Jury found to be indifferent, he challenges the Jurors by the Polls, he ought to put in and shew the Cause of his Challenge presently; but if no Triers are sworn, he is not to shew the Cause of his Challenge, till the Jurors, who are not challenged, be sworn. And if after such Challenge to the Array by the Defendant, and Trial, the Plaintiff challenges the Polls, he is not to shew Cause till the Panel is perused. *Pasch. 7 Jac. 1. 1 Bulst. 113, 114.*

Defendant
releasing
his Chal-
lenge to
the Array,
shall shew
Cause pre-
sently, if
he chal-
lenges the
Polls.

The Array was challenged by the Defendant, and two Triers were assigned by the Court, the Triers were challenged, and the Court assigned two others. *Fitzherbert*: We will assign two others, and you shall not chuse, but they shall be the Triers, for that is the Order of the Law, and he named the third and the ninth;

ninth ; and notwithstanding the Defendant objected to them, they were sworn to try the Array ; whereupon the Defendant perceiving they would affirm the Array, released his Challenge and challenged the Polls. *Fitzherbert* : He shall shew Cause immediately, this Release of the Challenge is a good Trial against the Defendant, for he confesses his Challenge to be false ; and this is stronger against him, than if it had been determined by the Triers. 27 H. 8. 26. *Bro. Chall.* 6.

A

T A B L E.

Age.

MEN of above seventy Years, or under twenty-one Years of Age, not to be put on Juries, *Page* 9, 34, 36, 115
 In a Writ *De aetate probanda*, every Juror should be of the Age of forty-two years at least, 36
 One of eighty Years not to be returned on a *Tales*, 97

Aliens.

Not to be sworn on Juries, 33, 115, 328
 Nor on a *Tales*, 97
 Except on Trials *per Medietatem Linguae*, 34, 98, 146
 And then want of Freehold no Cause of Challenge to them, 31, 148
 Of Trial *per Medietatem Linguae*, where an Alien is a Party, 146 to 150

Antient

A T A B L E.

Antient Demesne.

Tenants of Antient Demesne not to be returned on Juries, Page 37

Apothecaries.

Where not to be returned on Juries, 38

Attaint.

Juries guilty of giving a false Verdict, punishable by Attaint, 185
 The Judgment in Attaint, *ibid.*
 At Common Law, or by Stat. 23 H. 8. 186
 The Trial is by twenty-four Jurors 187
 In what Cases an Attaint lies, 188

Attainted.

Persons attainted of Treason, Felony, &c. not to be returned in Juries, 32, 123,
3-7
 Nor on a *Tales*, 97

Attornies.

Attornies and other Officers and Ministers of the Courts at *Westminster*, privileged from serving on Juries, 37
Vide 97, 282.

Battel.

What Matters are now triable by Battel, 283
The
Q 4

A T A B L E.

The Manner of it, Page 284, 285

Blind.

Blind Men not to be returned on Juries, 2, 34
 But if they have Understanding, may be
 returned on a *Tales*, 97

Challenges.

The Nature and several Kinds of Chal-
 lenges, 98
 Hearing Evidence on a View contrary to
 the Rule of Court, a good Cause of
 Challenge, 75
 A Juror may be challenged, notwithstand-
 ing a View, 76
 He who challenges for Kindred, must
 shew in what Manner they are of Kin,
 329
 But if the Kindred be found, though in
 a different Manner, it is sufficient, *ibid.*
 Who may challenge, 329
 One Plaintiff challenges, the other not, 334
 One Defendant challenges, the other not,
ibid.
 When the Plaintiff suggests Matter of prin-
 cipal Challenge to the Sheriff, and prays
 Process to the Coroners, if he denies
 this Matter whereby Process goes to the
 Sheriff, the Defendant shall not chal-
 lenge the Array for that Matter, 289
 Before the *Venire Facias* awarded, 44, 106,
 132, 289 to 295
 To the Array, 40, &c. 99 to 107, 295 to
 312
 Whether

A T A B L E.

Whether he who has applied for a special Jury may challenge the Array, <i>Page</i> 68	
Consanguinity in several of the Jurors, no Challenge to the Array,	330
Challenge to the Array, for that the Sheriff is within the Plaintiff's Distress, the Defendant may shew several Particulars,	<i>ibid.</i>
When the Plaintiff prays Process to the Sheriff, he shall not challenge the Array for any Matter that then lay in his own Knowledge,	331
Array made by Esliors may not be challenged,	332,
Challenge to the Array for Matter since,	<i>ibid.</i>
No Challenge to the Array of the <i>Tales</i> , after Challenge to the Polls of the principal Panel,	333
Array challenged by both Parties quashed,	<i>ibid.</i>
<i>Peremptory</i> Challenges,	107 to 114
Whether after Challenge for Cause,	134
To the <i>Polls</i> , 21 to 40, 107 to 125, 312,	<i>&c.</i>
Want of Freehold, <i>&c.</i> a good Cause of Challenge,	23, <i>&c.</i> 329
A Juror challenged by both Parties shall be drawn without being tried,	333
For Default of <i>Hundredors</i> ,	125, 309
When to be taken,	134
For or against the <i>King</i> ,	128, <i>&c.</i>
At what Time a Challenge is to be taken,	132
Challenge to a Juror after he is sworn,	336,
	338
When the Defendant is to challenge,	<i>ibid.</i>
Q 5	Not

A T A B L E.

Not after the Panel gone thro', *Page* 337.
When the Party shall shew Cause imme-
diately, 135, 339 to 341
Of Trying Challenges, 136

Clergymen.

Not to be returned on Juries, 38, 97

Clerks.

Attainted, not to be returned on a *Tales*,
97

Constables.

Their Duty in preparing Lists of Persons
qualified to serve on Juries, 46, &c.
Penalty for inserting Persons not qualified,
35, 48
And on their Neglect of Duty, 49

Coroners.

Not to be returned on Juries, 58
May be impanelled on a *Tales*, 97
When they are to return Juries, 40 to 45,
309 to 312
See Title *Challenges* before the *Ventre*
and to the Array.

Corporations.

Capital Ministers of a Corporation may be
returned on a *Tales*, 97

Coun-

A T A B L E.

Counsellors.

Not to be returned on Juries, Page 37

Counties Palatine.

Of returning Juries in them, 54
Tales in them, 89, 90

Criminals.

Persons attainted of Treason, Felony, &c.
not to be returned on Juries, 32, 123,
327
Nor on a *Tales*, 97

Customs of London.

How triable, 281

Deaf.

Deaf men not to be returned on Juries, 9,
34
Nor on a *Tales*, 97

Demurrer.

To Evidence, 214

Deacons.

See Clergymen, Priests.

May be returned on a *Tales*, 97

Distringas

A T A B L E.

Distringas Juratores.

Clause to be inserted in it, *Page* 55
The Reason and Nature of this Writ, 59,
Etc. 86

Dumb.

Dumb Men, if they have Understanding,
may be returned on a *Tales*. 95

Embacy.

What it is, and how punishable, 202, 203,
204

Eniors.

When to be appointed for returning a Jury, 41
Array made by them not to be challenged, 332

Evidence.

What ought be given in Evidence, 206
On the General Issue, 214

Excommunicated Persons.

Whether Excommunication be any Objec-
tion to a Man's being sworn on a Jury, 33, 123
Persons excommunicated may be returned
on a *Tales*, 97

Foresters.

Not to be returned on Juries, 38
May be impanelled on a *Tales*, 97

Freehold.

A T A B L E.

Freehold.

In what Case a Juror should have a Freehold, and of what Value, *Page* 10, 23, &c.

Grand Juries.

See Juries.

Habeas Corpora Juratorum.

Clause to be inserted in it, 53
The Reason and Nature of this Writ, 59,
 &c. 86

High Constables.

Their Duty as to preparing Lists of Persons qualified to serve on Juries, 47, &c.
Penalty on their Neglect of Duty, 49

Hundredors.

What Number sufficient, 22
Challenge for Default of Hundredors, 125,
 309
When to be taken, 134

Jew.

Had Trial by *Medietatem Linguae*, 166

Indictments.

Where void for a Default in Grand Jury, 6,
 7, 8, 9.
 By

A T A B L E.

By what Number to be found, *Page* 4, 12,
14

Infamous Persons.

Not to be returned on Juries, 32, 123, 327

Infants.

Not to be returned on Juries, 9, 34, 36,

Nor on a *Tales*, 115
97

Infirm men.

Not to be returned on Juries, 9, 34. *vide*

Inspection.

Trial by Inspection, 278

Judicial Process.

Old Method of Trial, 287

Juries and Jurors.

The several Kinds of them, 3

Their Office to determine Matters of

Fact, 2

Their Number, 2

Grand Juries, 3

By whom to be returned, 4

Of what Persons they ought to consist, 9

Of what Estate or Substance, 12

Men of the same County, 11

Their Number, 12

Their Oath, 12

Their

A T A B L E.

Their Method of Inquiry, Page 13, &c.
 Their Duty, and the Trust reposed in
 them, 15, &c.

Petit Juries.

Their Use,	19
Their Properties,	21
Of the same County,	<i>ibid.</i>
On an Issue out of two Counties,	22
What Estate or Substance a Petit Juror ought to have,	23, &c.
Of what Persons a Petit Jury ought to consist,	31
<i>See Challenges to the Polls, in toto.</i>	
Who are exempt from serving on Petit Ju- ries, 34 to 40.	
Who is to nominate and return a Petit Jury,	40
<i>See Challenges to the Array, in toto.</i>	
Of preparing Lists of Persons qualified to serve,	46
Penalty for inserting Persons not qualified,	55, 48
Of returning a Panel,	81
Remedy for Persons inserted who are not qualified,	48
Of the Jury Process,	51, &c.
The Number to be returned, 52, 53, 82, 83	
Of summoning the Jury,	4, 77
How long Time before the Time they are to serve,	77, 78
Punishment for taking Money to excuse Persons from serving,	78
None to be summoned but such as named in the Mandate,	78
What Number of Jurors to be returned,	82
What Number to be sworn,	84
What	

A T A B L E.

What Number may be granted on a <i>Tales</i> ,	<i>Page 94</i>
Of Drawing and swearing the Jury, 151,	165, 166
When of two Counties,	165
On Trial <i>per Medietatem Linguae</i> , <i>ibid.</i>	
Penalty on Juror not appearing, 152, 190	
Within what Time a Person who has served on a Jury is compellable to serve again,	78, 79
Names of such to be registred,	79
Methods of trying Facts,	154 to 166
Of withdrawing a Juror,	166
To be kept without Meat and Drink, &c. till agreed on their Verdict, 168 to 174,	195
Exceptions,	169, 172, 196
Fineable for eating, &c. <i>ib.</i>	
Where it shall avoid their verdict, <i>ib.</i>	
May eat after a private Verdict,	171
Misdemeanors committed by Jurors, 185 to 201	
Not appearing, or withdrawing before Verdict,	190
Refusing to give a Verdict,	191
Giving a false Verdict,	185
Giving their Verdict before they were all agreed,	192
Agreeing to find the Defendant guilty, and if the Court disliked that Verdict, then to find him guilty,	193
Not agreeing, may be carried after the Judges in Carts,	181
Casting Lots for their Verdict, 174, 194	
Taking Matter of Evidence with them, after they are gone from the Bar, 175, &c.	
Hearing	

A T A B L E.

Hearing Evidence on a View contrary to the Rule of Court,	Page 75
Money given to a Jury,	180
Whether they may take any Reward for their Trouble,	182
How far they are punishable in their judicial Capacity, for finding contrary to Direction of the Court, or what may seem full Evidence,	197
Of Embracery and other Crimes, with Regard to Jurors,	202 to 205
Of striking a Juror,	204

Special Juries.

Of appointing and returning them,	53, 66
-----------------------------------	--------

Jury of Matrons.

When impanelled, and their Duty,	36, 160, 161
----------------------------------	-----------------

Justices of Gaol-Delivery.

Of returning a Jury before them,	55, 56, &c.
----------------------------------	----------------

Justices of Nisi Prius.

Their Power, &c.	62
------------------	----

Justices of Oyer and Terminer.

Of returning a Jury before them,	55, 56, &c.
----------------------------------	----------------

Knights.

On a Jury,	22, 23 Cause
------------	-----------------

A T A B L E.

Cause of Challenge, Page 101, 308, 309

London.

What Estate requisite in a Juror to serve
at *Nisi Prius* in *London* and in High
Treason, 24, 31

No Trial at Bar in *London*, 60

Customs of *London*, how triable, 281

Lunatics.

Not to be returned on Juries, 9, 34

Matrons.

When a Jury of Matrons shall be im-
pannelled, 36, 160, 161

Medietas Linguae.

See Trials.

Mute.

Men who are Mute, if they have Under-
standing, may be returned on a *Tales*, 97

Of standing Mute and refusing to plead,
109, 110, &c. 162, &c.

New Trials.

See Trials.

A T A B L E.

Nisi Prius.

Of the Writ of <i>Nisi Prius</i> ,	Page 59
Trial at <i>Nisi Prius</i> ,	163

Oath.

Of a grand Juror,	12
Explained,	17
Of the Bailiff who has the Keeping them,	14, 158, 161
Oath of a Petit Juror,	156, 164
Of a Witness,	157, 158, 161
Of a Jury of Matrons,	161
Of a Jury to try one who stands mute,	163

Old Men.

See Age.

Oideal.

Old Method of Trial,	287
----------------------	-----

Outlaws.

Not to be returned on Juries, 6, 11, 12, 23,	123, 327
Nor on a Tales,	97

Pain fort & dure, 109, 110, &c.

Palatine.

See Counties Palatine.

Panel.

A T A B L E.

Panel.

The Meaning of the Word,	Page 99
Of returning a Panel into Court,	81
When Prisoner intitled to a Copy of the Panel,	4, 27, 82

Parliament.

Whether a Member of the House of Commons may be impanelled on a Jury,	57
---	----

Peers.

When tried by their Peers,	2, 23
When a Peer a Party, a Knight must be on the Jury,	23, 191
Not to be sworn on a Jury,	37, 115

Petit Juries.

See Juries.

Priests.

See Clergymen.

May be returned on a <i>Tales</i> ,	90
-------------------------------------	----

Private Verdicts.

See Verdicts.

Privilege.

From serving on Juries,	37, &c. Vide 79
Quakers.	

A T A B L E.

Quakers.

Whether to be returned on Juries, *Page*
39, 97

Record.

Trial by Record, 278

Sailors.

Not to be returned on Juries, 39, 97

Serjeants at Law.

When to be impanelled on Juries, 37, 97

Sheriff.

His Duty in returning Juries, 4, 40 to 45

One of two Sheriffs be a Party, 42

To return Persons inserted in Lists prepared by Constables, 46

Give a Justification to him, 50

Penalty on returning others, *ibid.*

Penalty for taking a Reward for excusing any Person from serving on Juries, 78

To register the Names of Persons serving, 79

and give a Certificate *gratis*, 79

May be returned by the Coroner on a *Tales*, 97

When the Sheriff and when the Coroner shall return the Jury, see *Tit. Challenge*, before the *Venire*, and to the Array,

Soldiers.

Officers not to be returned on Juries, 38, 97

Special

A T A B L E.

Special Juries.

See Juries.

Statutes.

Stat. Westm. 1. c. 12.	Page
Westm. 2. c. 30.	59, 63
c. 38.	9, 11, 21, 34, 52, 83
c. 48.	74
13 Ed. 1. St. 2. c. 2.	224
21 Ed. 1.	25
28 Ed. 1. c. 9.	10, 11
33 Ed. 1.	129
25 Ed. 3. c. 3.	119
c. 4.	3, 16
28 Ed. 3. c. 13.	34
§. 2.	146
38 Ed. 3. c. 12.	182
42 Ed. 3. c. 3.	3, 16
c. 11.	60, 61, 80
11 H. 4.	33
c. 9.	41
2 H. 5. c. 3.	10, 26, 28, 34
6 H. 6. c. 2.	8
8 H. 6. c. 29.	3
11 H. 11. c. 24.	8
1 R. 3. c. 4.	21
3 H. 8. c. 12.	7, 8
4 H. 8. c. 3.	23
5 H. 8. c. 6.	3
21 H. 8. c. 11.	22
22 H. 8. c. 14.	108, 110, 111
23 H. 8. c. 3.	186, 190
c. 13.	29, 30
32 H. 8. c. 3.	10
	Stat

A T A B L E.

Stat. 33	H. 8. c. 23.	Page 23, 28, 108
34	H. 8.	85
35	H. 8. c. 3.	30
35	H. 8. c. 6.	22, 125
	§. 6.	89
	§. 7.	93
	c. 8.	30
1, 2	P. M. c. 10.	27, 108, 147
4, 5	P. M. c. 7.	89
5	Eliz. c. 9.	220
	c. 14.	32
	c. 25.	89
14	Eliz. c. 9. §. 1, 2.	89, 90
18	Eliz. c. 12.	60
27	Eliz. c. 6.	22, 28, 30, 125
16, 17	Car. 2. c. 3.	29
25	Car. 2. c. 2.	105
1	W. M. Seff. 2. c. 2.	27
4, 5	W. M. c. 24.	29, 30, 31, 47
	§. 15.	23
	§. 18.	24, 90
	§. 19.	24, 90
	§. 20.	90
	§. 21.	35
6	W. M. c. 4. §. 3, 4.	39
7, 8	W. 3. c. 3.	4, 27, 82
	§. 7.	60
	c. 21.	39
	c. 32. §. 1.	72, 86
	§. 2.	
	§. 3.	91
	§. 4.	34, 36, 46
	§. 5.	78
	§. 6.	35, 50
	§. 7.	
	§. 8.	10, 12
	§. 9.	
	Stat.	

A T A B L E.

Stat. 7, 8 W. 3. c. 32. §. 10.	Page
§. 11.	-8
c. 34. §. 6.	39
1 Ann. St. 2. c. 13. §. 3.	11, 81
3, 4 Ann. c. 18. §. 5.	34, 36, 47, 49
4, 5 Ann. c. 16.	22, 125
§. 8.	77
10 Ann. c. 14. §. 6.	11, 81
3 Geo. 1. c. 15. §. 8.	42
9 Geo. 1. c. 8.	39
12 Geo. 1. c. 31.	60
3 Geo. 2. c. 25. §. 1.	47, 48
§. 2.	35, 49, 50
§. 3.	51
§. 4.	79
§. 5.	80
§. 6.	78
§. 7.	48
§. 8.	54, 84
§. 9.	54, 84
§. 10.	55, 84
§. 11.	151
§. 12.	152
§. 13.	152, 191
§. 14.	77
§. 15.	67
§. 16.	67
§. 17.	68
§. 18.	24
§. 19.	24
§. 20.	25
4 Geo. 2. c. 7. §. 1, 2.	79
§. 3.	24
6 Geo. 2. c. 37.	25
§. 2.	68
8 Geo. 2. c. 16. §. 15.	225

A T A B L E.

Surgeons.

Where not to be returned on Juries, *Page*
38

Tales.

What Estate required in a Juror serving on a <i>Tales</i> ,	24
<i>Tales</i> at Common Law,	88
<i>Tales de circumstantibus</i> by the Statute,	89
	to 98
In what cases grantable at this Time,	91
What Number may be granted on a <i>Tales</i> ,	94
Principal Panel challenged for Kindred in the Sheriff, whether the Array of the <i>Tales</i> made by the new Sheriff shall stand.	330

Treason.

On Indictment for Treason, Prisoner to have a Copy of the Panel, 4, 27, 60, 61,	82
Prisoner standing mute in Case of High Treason,	111, 112
Method of Trials in High Treason,	154

Trials.

Method of it on Indictment for High Treason,	154, &c.
At <i>Nisi Prius</i> ,	163
Of putting off Trial for a Default of the Jurors, a Party or Witness,	86
<i>Trial at Nisi Prius</i> , the Nature of it, and when to be granted,	59 to 64
R	<i>Trials</i>

A T A B L E.

<i>Trials at Bar</i> , of granting them,	Page 64
Not in <i>London</i> ,	60
Of returning Juries for them,	53
<i>Trials per Medietatem Linguae</i> , in what Case,	34, 146
Want of Freehold no Cause of Exception to an Alien on the Jury,	23, 98
Of swearing the Jury,	165
A Jew tried <i>per Medietatem Linguae</i> ,	166
<i>New Trials</i> , when first granted,	262
In Respect of what Action,	265
Hard Action,	266
Defence tending to defeat a just Debt,	267
In a criminal Prosecution,	268
After Defence at the first Trial,	269
For one where several Defendants,	270
For Objections to, or Misdemeanors in the Jury.	<i>ibid.</i>
For that a Witness was absent, or of ill Fame,	271
Proper Evidence rejected, or improper E- vidence admitted,	272
For new Matter discovered since,	<i>ibid.</i>
For excessive Damages,	273
Because the Verdict was against Evidence,	274
Where the Judges Certificate necessary,	<i>ibid.</i>
When to be moved,	275
Various Methods of Trial,	278
By Record,	<i>ibid.</i>
By Inspection,	<i>ibid.</i>
By the Bishop's Certificate,	280
Trial of the Customs of <i>London</i> ,	218
Trial by Wager of Law,	<i>ibid.</i>
By Parol Proofs,	<i>ibid.</i>
By Officers of the Court,	283
By Battle,	<i>ibid.</i>
By	

A T A B L E.

By Ordeal,
Judicial Morsel,

Page 287
ibid.

Venire Facias.

Of issuing it,	51
<i>Venire Facias</i> by Proviso,	69
When to be awarded to the Sheriff, when to the Coroners, and when to Esliors,	40 to 45
Of the Jury Process before Justices of O- yer and <i>Terminer</i> , &c.	56
Of the return of the <i>Venire Facias</i> ,	86
<i>Venire Facias de novo</i> ,	72, 86

Verdicts.

In Respect of the Time laid in the Issue,	235
In Respect to the Place,	237
Must find the whole Issue,	239
A Jury can't find the Intent of a deed or Will,	<i>ibid.</i>
Nor contrary to what is agreed to by the Parties,	240
The Verdict must be direct, and not ar- gumentative,	243
Must be certain,	244
Of Special Verdicts,	245
A Special Verdict may be given in any Action, and the Court cannot refuse it,	246
Of Intendment on a Special Verdict,	249
Verdicts <i>de bene esse</i> ,	253
Verdicts differing from the Declaration,	<i>ibid.</i>
Part one Way and Part another,	254
R 2	Part

A T A B L E.

Part only found,	<i>Page</i> 255
Against some Defendants only,	256
True in Substance,	257
Surplusage.	<i>ibid.</i>
When a Verdict may be altered,	259
<i>Private Verdicts,</i>	260
In criminal Cases of Life and Member a private Verdict cannot be given,	261
<i>Special Verdicts,</i>	245
May be given in any Action, and the Court cannot refuse it,	246
Of Intendment on a Special Verdict,	249
What Matter will avoid a verdict,	169 to 181

Verdurers.

Not to be returned on Juries,	38, 97
-------------------------------	--------

View.

In what Cases the Jury shall have a View,	75
Viewers, how to be appointed,	77

Wales.

What Substance for a Juror there requisite	24, 90
Of returning Juries there,	54
What Number,	84
<i>Tales in Wales,</i>	89, 90

Witness.

Of putting off the Trial for the Absence of a Witness,	87, 88
Who may be a Witness,	215
Whether	

A T A B L E.

Whether a Wife against her Husband, or the Husband against his Wife, <i>Page</i>	216
The King,	217
A Party,	<i>ibid.</i>
Attorney or Counsel,	16
Bail	218
One laying a Wager,	<i>ibid.</i>
In criminal Suits,	219
On the Statute of Hue and Cry,	224
Legatee,	226

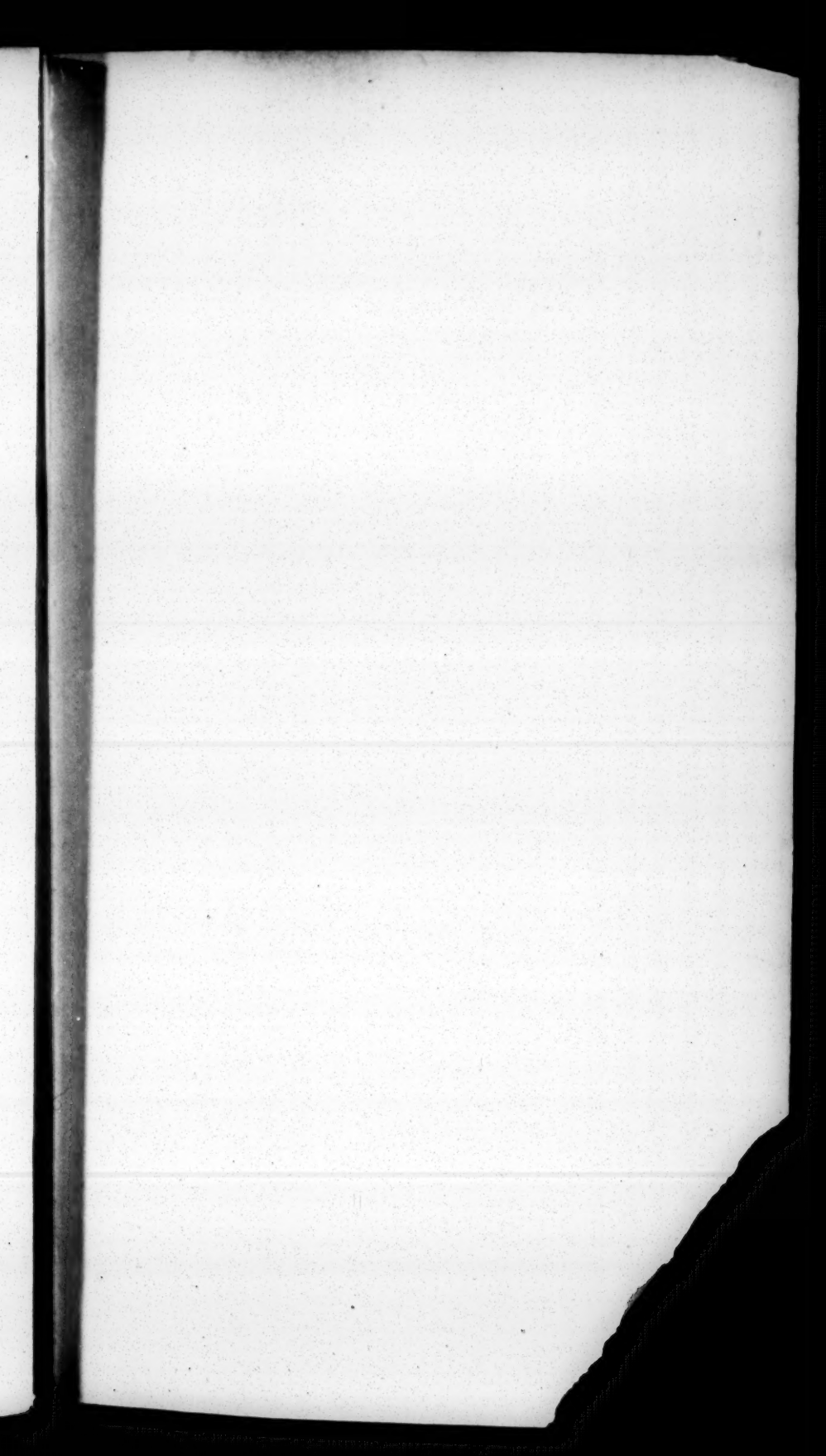
Women.

When to be sworn on Juries,	36, &c.
Pleading Pregnancy in Stay of Execution,	160

F I N I S.



3



578. d. 14